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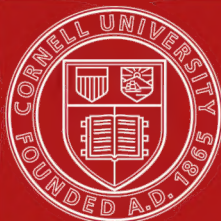


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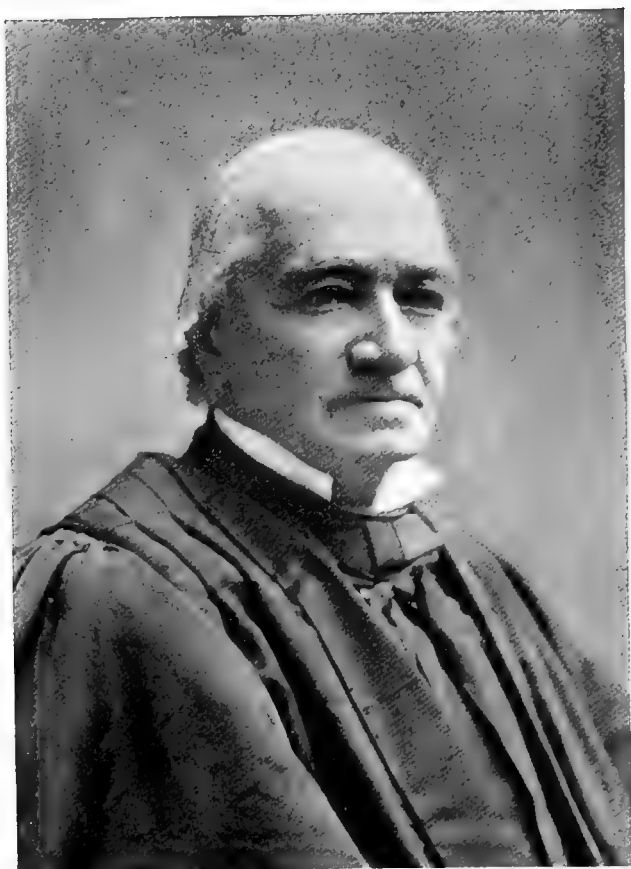


# **GREAT AMERICAN LAWYERS**









JOSEPH P. BRADLEY

From a photograph by Bell of Washington.





# Great American Lawyers

The Lives and Influence of Judges and  
Lawyers Who Have Acquired Perma-  
nent National Reputation, and Have  
Developed the Jurisprudence of the  
United States.

A HISTORY OF THE LEGAL PROFESSION  
IN AMERICA

EDITED BY  
WILLIAM DRAPER LEWIS

of the University of Pennsylvania  
Dean of the Law Department

VOLUME VI

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**JEREMIAH SULLIVAN BLACK.**



JEREMIAH SULLIVAN BLACK

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*J. D. Black*



# JEREMIAH SULLIVAN BLACK.

1810-1883.

BY

MARGARET CENTER KLINGELSMITH,

*Librarian of the Biddle Memorial Law Library of the University of  
Pennsylvania.*

THE Mountain Cavalry of Somerset, Pennsylvania, were to have a celebration and oration on the Fourth of July, 1830. This little town of about one thousand inhabitants lay between the peaks of the Blue Ridge and the Alleghany mountains, surrounded by peculiarly wild and beautiful scenery. It was situated in a cold and rugged region, which had given of its own nature to the race who lived there, for out of it had come many men of certain marked characteristics who had become known as the "Frosty sons of Thunder." Sons also of the men of '76 they were, to whom the events of those historic days were familiar household tales, heard a hundred times from the lips of the men who had lived in, and were a part of, them. So when they looked about for the man among them all who could best put into words all the feelings which rose in them at the thought of the days when men were lifted above the struggle for the daily living and

‘died for an idea, they found the man they sought in the grandson of a captain of the Revolution. From the lips and at the home of that grandfather he had heard the tales and absorbed the spirit of that earlier time. Born January 10th, 1810, he was but twenty years of age, yet had already been admitted to the bar. During his student years he had attracted the attention and won the respect of the townspeople by his contributions to the local newspapers; contributions so remarkable in tone and execution that it was natural to turn to their author to fill the place of orator on the great day. Scotch, Irish, and German blood flowed in the veins of the youthful speaker, but the swift alchemy of American life had fused these elements into a character that—unformed as yet—was to become absolutely, typically American, and to the men of the mountain who listened to him that day he gave a speech full of American vigor and hopefulness, prophetic both of what he was to become, and of the future of that country he was to serve—perhaps to save—in her time of greatest need.

The ancestors of Jeremiah Sullivan Black had come from Ireland and from Germany. They cleared land and settled upon it; they found a wilderness and they left, if not a paradise, at least as beautiful, as fertile, as pleasing a countryside as one need care to look upon. From them he inherited a love for farming which was a real passion, and to which he gave the devotion of a lifetime. From



them he took the massive, weighty aspect; the strongly marked features, and the bushy eyebrows overhanging "the most wonderful grey eyes that ever expressed a human soul." Out of the struggles of these early settlers with the forces which all pioneers find arrayed against them, to which to yield is death, but which faithfully fought result in a surrender in which the victors find themselves clothed with the elemental strength of the conquered forces, came his rugged strength, his forceful nature, his power to act and to overcome. At the time of his birth but thirty-four years had passed since the great declaration, and but twenty-one since the establishment of the Constitution—the real birth-date of the country. As yet its inhabitants, its legal ideas, its civic regulations, were going through their first processes of development. As he grew, these principles grew; as he matured, they matured.

When about five years old, Jeremiah Black was sent to school at Stoystown, "a little village in Somerset county, where I remained two or three months, when the teacher ran away and I was taken to Berlin, another town a few miles from Stony Creek. I learned nothing, or next to nothing at either place, except an intense dislike of confinement in doors."

This dislike he never lost, and when in Berlin he "united with other boys in searching for nails or pieces of iron among the ashes of a barn that had been struck by lightning and burnt down, in the belief that they would, as we were told, draw the light-

ning. We deposited them with great care under the school house, with a firm faith that the thunder would demolish the building, and put an end to our troubles for a time at least."

It is not recorded that the desired result was accomplished. Although he hated school he says of himself that he "loved books," the record of many a scholar. A little later he went to the town school in Bridgeport, living in that town with an uncle, and it was there that there came to him the first stirrings of an ambition to outstrip his fellows; the first intimations of that power of the intellect which was so early to raise him above them. He here received the elementary training in Latin, which formed the foundation for his later learning; mathematics, philosophy, and the natural sciences, learning which, with this exception, he derived from omnivorous reading, for he left school finally at "seventeen and a half," to study law in the office of Mr. Chauncey Forward, in Somerset. His own predilection had been for the study of medicine. He felt no drawing toward the law. The vast field of knowledge to be traversed; the mass of legal literature to be mastered; the abstruse character of the acquirements to be attained before the student could become a master of the science of the law, affrighted him. His accomplished preceptor intended to encourage him by giving him some elementary lectures, but he records that "his earliest lectures and conversations depressed me still more, by the vast-

ness of the knowledge which he himself possessed." Yet the task was to be done and he did it. By patient labor, by the knowledge that others had succeeded, and by the help of a factor he did not himself recognize, his own remarkable mentality, he made what he calls "slow progress" in the learning of the law. Before he was twenty he reluctantly yielded to Mr. Forward's urgent demands, and submitted to an examination for admittance to the bar. He must have acquitted himself well, for he received "divers congratulations and compliments," which he declares he did not deserve. His daughter in her reminiscences of the life of her father gives a description of his personal appearance and an anecdote told by himself to show what he was at that time:—

You are naturally anxious to know how I looked. I can give you no precise idea, but I must have been very ungainly. My associates did not venture any remarks to me on such a subject, but later in life, many of them said, that while I was a student I seemed to them most awkward and unpromising. When a half-grown boy I boarded at Captain Webster's, whose wife watched me with much interest. One evening she sat knitting at the fire place while I was opposite to her, absorbed in the study of my lessons. After giving me a long look she said with a sigh, "Well, Jere, you may be a very good man some day; I hope you will; but, bless my soul, you never will be handsome!"

Mr. Forward immediately upon the admission of Black to the bar, left for Washington, as he was a member of Congress at that time. He must have felt great confidence in his young coadjutor for he left his entire business in his hands. It was a con-

fidence not shared by Black himself. To him at that time life was a thing to be born as best it might. He speaks later of an anxiety and trouble under this load of responsibility, greater than he could express. Only the force of circumstances compelled him to keep on. Sincere, straightforward, a hater of all hypocrisy, he now found himself in a position where he was forced to act as if he were wiser than he believed himself to be; as an adviser when he needed advice; to be an actor in the earnest scenes of legal life at a time when most men are, and when he most sincerely desired to be, merely a spectator. During these years he not only took charge of the practice of Mr. Forward's office, but he was also Prosecuting Attorney and Deputy Sheriff. Surely a sufficient load for a man who had barely attained his majority. The men with whom he had to compete were men of character, and attainments, possessed graces of person and mind which he compared with his own rugged exterior and untrained rawness until—if it is permissible to transmute the simple phrases he writes about himself into their underlying pathos,—he shrank from the daily contest in the arena of the court room and the law office, as one shrinks from the touch of acids on a wound. Had he been a smaller man, a smarter man, of the every-day type, he would not have so suffered. Such men would have rejoiced in being thus forced ahead of older, wiser, better trained men. To them it would have seemed a recognition of their transcendent abilities. And on

them the lesson would have been lost. To the greater mind this painful entrance into the realm of intellectual contests was as the training of the squire of old for his knighthood. Lessons scorched into the brain leave indelible traces never to be forgotten. His experience in this hard school gave him a mastery of his art not otherwise to be acquired. It made him eminent at the bar at a period of life when other men are still in tutelage; it made him a judge at thirty-two.

Intensely the law took possession of him; intensely he gave it out to others. He never learned the philosophic calm, the cool carelessness of the academic school, the attitude of the scholar speaking from the secluded study. To him the law and the prophets spoke with one voice and in that voice there was, there could be, no indecision.

Life was not all stress and strain however. The home of Chauncey Forward, pleasant and harmonious, a place where there were "books and good talk," held also a daughter, Mary Forward. When Jeremiah Black was first introduced into the household she was a child; indeed she was little more, only sixteen, when they became engaged. March 23d, 1836, Mary Forward and Jeremiah Sullivan Black were married, and for a short time they remained at the home of the bride. It was not long, however, before they went to housekeeping in a home of their own, where they were soon famous for having the finest fruits and vegetables in that region. The in-

tense interest felt by the master of the domain in these matters is illustrated by an incident told by his daughter:—

One night Mr. Black got home from a distant court too late to see how his garden grew. He asked his wife if some plum trees which he had planted before he left had grown in his absence. She said, she thought not much. The next morning he said, 'Mary, those plum trees have grown several inches.' 'How do you know?' she said. 'Why, I went out last night after you were asleep and *felt* them.' "

In this home, five children were born to them, and they shared with their parents the love of the home and the delight in the country-side. He had for each of these children a pet name and was most demonstratively fond of them.

In 1839, the father-in-law of Mr. Black died. Chauncey Forward had been a believer in the sect generally called by the name of the founder, and known as Campbellites. Mr. Black had been with him when he died and the immediate effect of that death and his remembrance of a life in which he had seen so much to admire and emulate, led to the final adhesion of Mr. Black to that sect in 1843. He always remained a most ardent member of that faith.

In 1842 when Mr. Black was but thirty-two years of age, Governor Porter appointed him Judge of the Court of Common Pleas for the circuit composed of the counties of Franklin, Somerset, Blair and Fulton. He was the youngest judge in the state, and it took tact and the exercise of much kindness of heart and

judgment to avoid hurting the feelings of the older members of the bar, but the record of those times seems to show that Judge Black was fully equal to the tax upon his discretion and his native courtesy.

As a judge of the Common Pleas, his strength of mind, his vivid mentality, his knowledge of the law, and his integrity of character, made him a power not only on the bench, but in the life of the people. In politics he was a "Democrat, self-inspired and self-taught, for his father was a Whig, who had served his state in Congress."<sup>1</sup> He was recognized as a foremost man in that party, and it was that party which was then in the ascendant, and the most powerful politically in the state. He was suggested as a candidate for governor, senator, judge, and even as a possible candidate for president. As to the latter office he said, "Though I have seen many cases of presidential fever, have watched with interest its malignant effects, have seen it more fatal than small-pox or yellow fever, yet I may truthfully say that I never felt the slightest touch of it."

In 1851, when under the Constitutional amendment the system of electing the judiciary went into operation in Pennsylvania, Judge Black was nominated by the Democratic party in the Pennsylvania State Convention for judge of the Supreme Court of the state. The entire Supreme Bench was elected at that time, for terms of three, six, nine, twelve, and fifteen years. The Whigs nominated five men; the

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<sup>1</sup> Blaine, *Twenty Years in Congress*, p. 235.

Democrats five. Judge Black received the highest number of votes. His comment on this fact is characteristic. "Of the whole ten," he said, "Mr. Meredith was without doubt the greatest and most distinguished man, yet when the poll came he received the lowest vote, while I got the highest. This shows how fallible a test the popular judgment is on the merits of a candidate for judicial office."<sup>2</sup> The length of the term was to be decided by lot, the one drawing the shortest term to be chief-justice. The shortest term fell to Judge Black. Although thus made chief-justice by fate, he always refused to consider that any one else could take the place of the revered Judge Gibson. Upon the death of the latter in 1852, Judge Black delivered his eulogium upon Gibson, couched in words that have since been used most aptly to describe his own merits and attainments. Of that eulogy it was said, "That single production, like the *Elegy of Gray*, should make his name immortal. In all the productions of Grecian minds there is nothing to excel its stately grandeur and beauteous garb. Both in logic and rhetoric it stands preëminent."<sup>3</sup> "To those who listened it was like the cry of the anointed successor of the translated seer; and they could almost hear the rustle of the mantle descending with a double portion of prophetic power."<sup>4</sup>

<sup>2</sup> M. B. Clayton, *Reminiscences*, p. 91.

<sup>3</sup> M. B. Clayton, *Reminiscences*, p. 94.

For the Life of Gibson, see *supra*, vol. III, Ed.

<sup>4</sup> Niles, Paper on Black, Report of the Pennsylvania Bar Association, 1903, p. 403.



The decisions of Judge Black during the next six years (in 1854 he was reëlected for fifteen years, by a large majority) form a most striking series of judicial rulings. The keynote of his method is probably to be found in his own remarks upon his despair when first set to study the law. His heart sank within him when he first saw the tools he must handle, the multiplicity of those sources from which he must draw his knowledge of the law. "I did not know the value of general principles, or how legal problems could be solved by the application of fundamental maxims." Through the pain and perplexity of the following years he had learned that lesson. He did not allow himself to be overwhelmed by the mass of precedent which threatened him in those early days. His vigorous mind escaped the obstacles which might have ensnared a weaker intelligence, and he learned in those long and lonely years of self-dependence and self-discipline, to transmute precedent to principle, to ground principle on precedent, to bring out of the union those fundamental maxims which are immutably true however mutable the facts to which they are applied. It was not ignorance of, but mastery over, precedent, which made him apparently independent of the authority of decided cases, and freed his recorded decisions from the useless multiplication of citations upon points which he knew to be no longer questionable. He was one of those judges who upheld the doctrine of *stare decisis* vigorously. Thus, we find in one of

the earliest cases which came before him as chief-justice: <sup>5</sup>

Where a question has been once deliberately settled after solemn argument, it ought not to be disturbed, unless it be so manifestly erroneous that it cannot be supported without doing violence to reason and justice.

It is sustained not by a current, but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*—that great principle which is the sheet-anchor of our jurisprudence <sup>6</sup>—can deny that it is immovably established.<sup>7</sup>

He spoke even more strongly upon this point a little later, when he said: <sup>8</sup>

Of course I am not saying that we must consecrate the mere blunders of those who went before us, and stumble every time we come to the place where they have stumbled. A palpable mistake, violating justice, reason, and law, must be corrected, no matter by whom it may have been made. There are cases in our books which bear such marks of haste and inattention, that they demand reconsideration. There are some which must be disregarded, because they cannot be reconciled with others. There are old decisions of which the authority has become obsolete, by a total alteration in the circumstances of the country and the progress of opinion. *Tempora mutantur*. We change with the change of the times, as necessarily as we move with the motion of the earth. But in ordinary cases, to set up our mere notions above the principles which the country has been acting upon as settled and established, is to make ourselves not the ministers and agents of the law, but the masters of the law and the tyrants of the people.

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<sup>5</sup> McAllister vs. Samuel, 17 Pennsylvania Reports, 114.

<sup>6</sup> This expression had been used by Jefferson.

<sup>7</sup> Bank of Pennsylvania vs. Commonwealth, 19 Pennsylvania Reports, 144.

<sup>8</sup> McDowell vs. Ayer, 21 Pennsylvania Reports, 417, 423.

The law to him was sacred; it was the protector of the weak, the shield of virtue, the hope of humanity. Any action which tended to weaken this protection, withdraw this shield, destroy this hope, was a deed of darkness to be defeated at the cost of any exertion, any pains, any labor, mental or physical, which might be necessary. It is this quality of the man which impressed itself so deeply on the law of his state. He did not announce new principles; he did not inject new theories into old formulas; he did not dissect the old principles and put them into new combinations to pose as original creations; his mind was not of that caliber. What he did to the law of Pennsylvania was to reanimate principles perishing through inadequate statement, to vivify that which was lifeless, to give a soul to the soulless body of the law. For to him it was a living soul, and as it appeared to him he made it appear to others. He has been said to have had "an intuitive ethical sense," but intuition is only knowledge become second nature; that which has been burned or stamped into the mind; trained into it from earliest infancy. The life he had lived had burned and stamped and trained him into a sure sense of right and wrong. He had wrestled with the angel in the wilderness and out of that struggle he had come out victor. He held always to his opinion in *Wilson vs. Hayes*,<sup>9</sup> that "no man should be permitted to set up a defense which he knows to be dis-

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<sup>9</sup> 18 Pennsylvania Reports, 354.

honest, or which he does not know to be just or legal," and to the belief also that "the law is made for practical uses. It listens to no metaphysical subtleties; and will not consent, on any terms, to call that right which every sound heart feels to be wrong,"<sup>10</sup> and that "Legal tribunals can enforce only those obligations which ought to have been voluntarily performed."<sup>11</sup>

When Judge Black came to the supreme bench the power of the corporations was but in its infancy. He foresaw that the infant was to grow with unexampled rapidity; and doubted that the power so surely to be acquired would be used with discretion and a due consideration of the rights of others. There was no inclination in the mind of Judge Black to hamper the development of the natural resources of the country or to interfere with the progress of industrial enterprise. He wished that the people should progress as fast as possible, but he wanted the whole people to do it, not that a select few should prosper at the expense of the many. He believed that "the jurisprudence of the country must keep, at least, in sight of the times."<sup>12</sup>

In 1853, the case of *Sharpless vs. the City of Philadelphia*,<sup>13</sup> came for decision before the Supreme Court. The question whether under the provisions of the constitution, a city could subscribe to the stock

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<sup>10</sup> *Miller vs. Wilson*, 24 Pennsylvania Reports, 114.

<sup>11</sup> *Whiteside's Appeal*, 23 Pennsylvania Reports, 114.

<sup>12</sup> *Hole vs. Rittenhouse*, 19 Pennsylvania Reports, 305.

<sup>13</sup> 21 Pennsylvania Reports, 147.

of a railroad company, was to be decided. Judge Black recognized the far-reaching consequences the decision must have. He felt that it was, "Beyond all comparison, the most important cause that has been in this court since the formation of the government." He stated with convincing clearness the arguments in favor of the right, and the dangers—already apparent in England—which might menace the state if that right were conceded. But he would allow no influence to such considerations. The question was purely judicial; as such it must be answered. The constitutional argument he then proceeded to give was a most authoritative interpretation of the constitution. His statement in regard to the reserved powers was full, free and vigorous.

The General Assembly cannot, therefore, pass any law to conflict with the rightful authority of Congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the Declaration of Rights, nor change the organic structure of the government, nor exercise any other power prohibited in the constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

But beyond this there lies a vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others. Of this field the General Assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their own discretion. The reservation of some powers does not imply a restriction on the exercises of others which are not reserved. On the contrary, it is a universal rule of construction, founded in the clearest reason, that general words in any instrument or statute

are strengthened by exceptions, and weakened by enumeration. To me, it is as plain that the General Assembly may exercise all the powers which are properly legislative, and which are not taken away by our own, or by the federal constitution, as it is that the people have all the rights which are expressly reserved.

We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

But apart from this important constitutional point, there was the question whether this was using public funds for a public or a private purpose, and here Judge Black used with effect that "common sense which is the best part of the common law." He said:

It is a grave error to suppose that the duty of a state stops with the establishment of those institutions which are necessary to the existence of government; such as those for the administration of justice, the preservation of the peace, and the protection of the country from foreign enemies; schools, colleges, and in-

stitutions, for the promotion of the arts and sciences, which are not absolutely necessary, but highly useful, are also entitled to a public patronage enforced by law. To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of a sovereign, as plain and as universally recognized as any other. It is on this principle that the mint and post-office are in the hands of the government; for they are but aids to commerce. For the same reason we maintain a navy to keep open the highway of nations. It was a commercial restriction which caused the revolution, and injuries to our trade which produced the subsequent war against England, with all its expense of money and blood. Canals, bridges, roads, and other artificial means of passage and transportation from one part of the country to the other, have been made by the sovereign power, and at the public expense, in every civilized state of ancient and modern times. I need not say how much of this has been done in Pennsylvania; but if the works erected by the Commonwealth for the promotion of her commerce, are not public improvements, then every law relating to them is void; every citizen may repudiate his share of the State debt, if he pleases, and defend his property by force against a collector of State taxes.

It being the duty of the State to make such public improvements, if she happen to be unable or unwilling to perform it herself to the full extent desired, she may accept the voluntary assistance of an individual, or a number of individuals associated together and incorporated into a company. The company may be private, but the work they are to do is a public duty. . . .

Railroads are not private affairs. They are public improvements, and it is the right and duty of the state to advance the commerce, and promote the welfare of the people by making, or causing them to be made at the public expense.

Having thus done what there was in him to do for the extension and upbuilding of the railroads, as a means of aiding in the development of the state and

the prosperity of the people, he did not therefore and because of his own belief in their beneficence when properly conducted and his formulated opinions in regard to the subject, yield to the claims of those corporations to yet greater power.

He had clearly and forcibly stated his reasons for his belief that they had certain rights under the constitution. He was equally ready to assert the rights of the people and of the state, against any and all usurpations upon the part of the railroads. In 1854, 1855, and 1856, the Erie Railroad was engaged in constant litigation. In the first case before the courts the company was found overstepping the boundary of the rights conferred upon it by its charter. In a most characteristic decision Judge Black gave his opinion as to the duties of the judiciary in such circumstances, and the rules which should regulate it in determining the rights of chartered companies.

This case requires us to give a construction to the charter of a private corporation. The frequency of such cases excites some surprise, when we reflect that an act of incorporation is and always must be interpreted by a rule so simple, that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation, it may do; beyond that all its acts are illegal. And the power must be given in *plain* words or by *necessary* implication. All powers not given in this direct and unmistakable manner are withheld. It is strange that the attorney-general, or anybody else, should complain against a company that keeps itself within bounds, which are always thus clearly marked, and equally strange that a company which has happened to transgress them should come before us with the faintest hope of being sustained. In such cases ingenuity



has nothing to work with, since nothing can be either proved or disproved by logic or inferential reasoning. If you assert that a corporation had certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation. . . .

But we do not mean to discuss the subject over again. The lawyer who is not already familiar with the numerous authorities upon it, to be found in every book of reports, will probably never become so; and the citizen who does not believe it to be a most salutary feature in our jurisprudence, would hardly be convinced though one rose from the dead.

In accordance with this decision the railroad was ordered to take up its tracks within four months. A number of intermediate orders were then made, and in the second opinion filed by Judge Black, he was as vigorous in condemning the proposed illegal action of the city in proposing to tear up the tracks of the road, as he had been in denunciation of the proposed violation of its charter rights by the railroad.

He was not to be made to twist the law to suit the purposes of either side or to exploit his own opinions as to what he thought the law should be. To do justly as a judge was to announce the law to be what he found it to be, whether it agreed with the interests of the corporation, or with his own ideas, or not.

The most important decision in this line of railroad cases was delivered in 1856. The charter of the Erie and Northeast Railroad Company had been repealed

and Mr. Casey appointed to take possession of the property. The company asked the Supreme Court to enjoin Mr. Casey from doing so. The opinion is a classic in Pennsylvania law; its reasoning has become a part of its jurisprudence. The following paragraphs from this decision are typical of his method and of his manner of treating such questions from the bench:

What the defendant means to do is to execute the plain mandate of the supreme law-making power of the state; to carry into effect an Act of Assembly, passed in regular form. This act, if it be law at all, is paramount to all other law on the subject, and must be obeyed. If, however, the legislature had no *power* to pass it, then it is wholly void, and we must regard it as if the place it occupies on the statute book were a blank.

The right of the judiciary to declare a statute void, and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave that it is never to be exercised except in very clear cases; one department of the government is bound to presume that another has acted rightly. The party who wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving, beyond all doubt, that it is so.

It is also very well settled that no statute is unconstitutional merely because it is wrong in policy or principle. It is not enough to prove that it is contrary to a sound public morality, or injurious to private rights. Inconsistency with rules of law or principles of equity, will not make it void. Nothing will have that effect but a *direct* collision between its provisions and those of the federal or state constitution. For this proposition I have no authority or reasons to offer beyond what are already on record in the case of *Sharpless vs. The City of Philadelphia*, 9 Harris 147.

The plaintiffs' counsel assert that the Act of 1855, under which the defendant proposes to take the railroad into his possession,

impairs the obligation of a contract. The Constitution of the United States (Art. 1, sec. 10), and that of Pennsylvania (Art. IX, sec. 10), forbid the making of any law impairing the obligation of contracts.

An act granting corporate privileges to a body of men is, when accepted, a contract between the state and the corporators. It is not worth while now to try whether this doctrine will stand the test of original principles. It is sustained by everything that we are bound to regard as authority, by the decisions of all the courts in the country, by the opinion of the legal profession, and by the general acquiescence of the people. It is not denied by the defendant or his counsel, or by anybody else who has attempted to sustain the action of the legislature in this case. Being a contract, it cannot be rescinded by the act of one party without the consent of the other. A grant of corporate privileges for a special period cannot be resumed by the state within such period. If the charter be without limitation as to time, it is forever irrevocable.

It does not follow from this that corporations are beyond the reach of public control. When the privileges they enjoy are fraudulently abused, the courts may pronounce them forfeited. In some cases also, the legislature, when granting the franchises, reserves to itself the right to revoke them. When the charter contains such a stipulation, it is as much a part of the contract as anything else that is in it. . . .

The authority given by the Act of October, 1855, to the defendant to take possession of the railroad is asserted by the plaintiffs' counsel to be an act of confiscation—a taking of private property for public use without compensation. If this be true, the injunction ought to be awarded; for no legislature can do such a thing under our constitution. When a corporation is dissolved by a repeal of its charter, the legislature may appoint, or authorize the governor to appoint a person to take charge of its assets for the use of the creditors and stockholders; and this is not confiscation, any more than it is confiscation to appoint an adminis-

trator to a dead man, or a committee for a lunatic. But money, or goods, or lands, which are or were the private property of a defunct corporation, cannot be arbitrarily seized for the use of the state without compensation paid or provided for. This act, however, takes nothing but the road. Is that private property? Certainly not! It is a public highway, solemnly devoted by law to the public use. When the lands were taken to build it on they were taken for public use; otherwise they could not have been taken at all. It is true the plaintiffs had a right to take tolls from all who traveled or carried freight on it, according to certain rates fixed in the charter, but that was a mere franchise; a privilege derived entirely from the charter, and it was gone when the charter was repealed. The state may grant to a corporation, or to an individual, the franchise of taking tolls on any highway, opened or to be opened, whether it be a railroad or river, canal or bridge, turnpike or common road. When the franchise ceases by its own limitation, by forfeiture, or by repeal, the highway is thrown back on the hands of the state, and it becomes her duty, as the sovereign guardian of the public rights and interests, to take care of it. She may renew the franchise, give it to some other person, exercise it herself, or declare the highway open and free to all the people. If the railway itself was the private property of the stockholders, then it remains theirs and they may use it without a charter as other people use their own—run it on their own account—charge what tolls they please—close it or open it when they think proper—disregard every interest except their own. The repeal of charters on such terms would be courted by every railroad company in the state; for it would have no effect but to emancipate them from the control of law, and convert their limited privileges into a broad, unbounded license. On this principle a corporation might be rewarded, but never punished, for misconduct. Repeal of its charter, instead of bringing it to a shameful end, would put “length of days in its right hand, and in its left hand riches and honor.” But it is not so. Railroads made by the authority of the Commonwealth upon land

taken under her right of eminent domain, and established by her laws as thoroughfares for the commerce that passes through her borders, are her highways. No corporation has any property in them, though corporations may have franchises annexed to and exercisable within them.

It was during this period of his judicial career that the "Barney Hole Case" came up for adjudication. The property in dispute had been granted by the state to an early settler under a land warrant, or, as so often had happened in the first days of the commonwealth, two warrants, the boundaries of one over-running the boundaries of the other. The earliest reports of the state are full of these cases, and Judge Gibson had decided case after case of the same nature in his long years on the bench. Gibson was Black's mentor and example, and Black gave the decision in the case of *Rittenhouse vs. Hole*<sup>14</sup> in accordance with a decision by Judge Gibson in *Waggoner vs. Hastings*,<sup>15</sup> declaring that it would be extravagant presumption to try to make the reasoning of that great Judge clearer or stronger by any additions of his own. The case went back to the County Court, and was decided in accordance with Judge Black's decision. The defeated litigant took a writ of error, and when the case came up before the Supreme Court once more, Gibson was dead, and Lewis, then Chief-Justice, reversed Judge Black's decision, treating that decision with much satire, and the authority of the

<sup>14</sup> 19 Pennsylvania Reports, 305; 25 Pennsylvania Reports, 491. Dissenting opinion, 1 Pitts., 284.

<sup>15</sup> 5 Pennsylvania Reports, 300.

cases decided by Gibson with scant respect. Judge Black might have kept silence under his own treatment, but the slight to the memory of Judge Gibson was not to be forgiven; he filed a dissent so biting in its satire that the "propriety of calling him to account for contempt of that court of which he was a member," is said to have been considered. That dissent remains the most celebrated dissenting opinion in the annals of the courts of the state. There are many strong and striking sentences in the opinion, but perhaps one near the end is the most celebrated and characteristic in form:

The judgment now about to be given, is one of "death's doings." No one can doubt that if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his property; and thousands of other men would have been saved from the imminent danger to which they are now exposed of losing the homes they have labored and paid for. But they are dead, and the law which should have protected those sacred rights has died with them. It is a melancholy reflection, that the property of a citizen should be held by a tenure so frail. But "new lords, new laws," is the order of the day. Hereafter, if any man be offered a title which the Supreme Court has decided to be good, let him not buy if the judges who made the decision are dead; if they are living let him get an insurance on their lives; for ye know not what a day or an hour may bring forth.

Decision after decision set forth in phrases sharp, distinct, and above all distinctive, gave Judge Black a place and standing among the jurists of Pennsylvania which at that time was commanding, and which has since become recognized as unique. Strength

and independence of thought, originality of expression and absolute integrity and fearlessness, were already the marked features of his personality. They were so marked that when, in 1857, President Buchanan, needed a strong man who had never sought the place—for which several strong men were fighting—he turned to Judge Black of Pennsylvania, and made him his Attorney-General, sending him notice of his appointment before he had any knowledge that he was even mentioned for the place. In fact Judge Black was at the time upon the point of starting upon a trip to Europe and had engaged his passage. He had served upon the bench for fifteen years and felt the need of a rest, and a great desire “to revel in antiquities” in those old lands from which his ancestors had come. The appointment was announced to him by President Buchanan in the following terms:

WASHINGTON, 6 March, 1857.

MY DEAR SIR: I have this moment signed your commission as Attorney-General of the United States, and have done this with great pleasure. I hope that you may find it agreeable to yourself to accept this important office, and I entertain no doubt that we shall get on harmoniously and happily together.

There were certainly great difficulties in the way of your appointment, and Mr. Glancy Jones has behaved very well in contributing to the result. I may also add that Governor Bigler is quite satisfied with it, and I venture to express the hope that any past difficulties between you and himself may pass away and be forgotten. We must be a unit here if possible.

I hope you will come to Washington immediately, and in the meantime, believe me to be always

Very respectfully your friend,

Hon. J. S. Black.

JAMES BUCHANAN.

Judge Black did go to Washington immediately, and it was while there that he was to become so well known, so useful a character, so strong an element in an administration, which so much needed strength and determination, and the vigorous qualities which were so eminently characteristic of Judge Black.

With his appointment to the Attorney-Generalship of the United States, Mr. Black laid aside the judicial ermine, never again to put it on. One part of his life-work was finished and laid away among the accomplished facts of his life. He had made his record upon the judicial history of his state, and his work, in office or out of office, was henceforth to be done before the eyes, not of the state alone, but of the nation. The country-seat in Somerset, so inwoven with memories of the early days of struggle and high hopes, grown so beautiful by means of the loving care, the unceasing labor, he had bestowed upon it, was sold. The newly-appointed Attorney-General took his family to Washington, "where it was his fate to be a very hard-working, and, during the latter part of his official term, a very anxious and troubled public servant."<sup>16</sup>

It was an uprooting not only of the fibers of home and old associations but of long-accustomed habits on the bench. The judge had once more to become the advocate. His friends feared that fifteen years had dulled the blade of the fencer, and weakened his skill in attack and defense. He had, however, in his first

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<sup>16</sup> M. B. Clayton, *Reminiscences*, p. 102.



case a cause to arouse all his latent powers. It was a California land claim<sup>17</sup> where "the conspiracy, fraud and forgery which formed the basis of the claim, had eluded the scrutiny of the Board of Commissioners and the court below."<sup>18</sup> The knowledge that Mr. Black was to make his first appearance as Attorney-General had aroused much interest among lawyers and representative men at the capital, and the attendance upon the court that morning was large. Mr. Black made no allusions to the circumstances, no apology for any awkwardness he might show in his new work, no appeal for indulgence. He plunged at once into the work of the case, analyzing, accusing, examining; "tearing aside the flimsy covering of false pretense with scorching sarcasm." Those who had come to hear formal sentences flowing prosily from calm lips were startled by the informality, delighted by the vigor and freshness of style, of the new Attorney-General. "The Judges kept wide awake during the whole speech; and ever after that, when he rose to speak, there was an unusual stir and rustling among the black gowns and a smile of expectancy took the place of their usual solemn and sleepy gravity. Black had 'murdered sleep.'"<sup>19</sup>

This case was followed by many others of the same nature. The grants from the Spanish and Mexican governments formed the basis of many spurious and

<sup>17</sup> *United States vs. Cambuston*, 61 *United States Reports*, 20 *Howard's Reports*, 59 (1857).

<sup>18</sup> M. B. Clayton, *Reminiscences*, p. 104.

<sup>19</sup> M. B. Clayton, *Reminiscences*, pp. 104-5.

fabricated titles to much of the valuable agricultural and mining land of California. The United States was bound by treaty to respect and ratify such of these as were valid. In the unsettled state of the country it was not difficult to set up plausible titles to desirable property; not difficult to fabricate evidence; and there were not lacking men to take advantage of these circumstances. The Attorney-General was a fighter and he loved above all things to wage war against fraud, deceit, dishonesty of any kind. "Rascals hated him," and no wonder, for by him they were prevented from stealing hundreds of millions of dollars from honest settlers and from the United States. It was good work, and work suited to the character of the man who had it to do. Congenial work, congenial companions, pleasant surroundings, all contributed to make his situation agreeable. Mr. Buchanan was polite, kind, always dignified and ever correct. Howell Cobb, of Georgia, and Jacob Thompson, of Mississippi, were jolly and genial. For two years life was at its best. But the shadow of the coming changes moved nearer with each month of those years. Mr. Black had no sympathy with the radicalism which would have swept away southern institutions regardless of the justice of such measures, or of their consequences to the Union. He spoke of his own state as the "breakwater that protected the slave states from such radicalism as this." He was a most religious man, whose religion was his life,

not a thing apart to be resorted to in special crises and upon set days and occasions. So with his political opinions. Jefferson and Jackson were his political exemplars; their philosophy was his philosophy—"He believed in the principles of Democracy as he did in the principles of Euclid—all that might be said upon the other side was of necessity absurd—" The teachings of the Bible were true; the tenets of the Democracy were true; he that attempted to evade either was false to the faith. Therefore since the Bible sanctioned slavery he could not question the custom. If Abraham might hold slaves without condemnation, so might Jefferson Davis or Robert E. Lee. Religion and politics were things to be lived consistently with the teachings of the fathers, and he could have no sympathy with those who held that new days meant new ways. In the early days of his service on the Supreme Bench of Pennsylvania, there had come to him for decision a case, in which he had to refuse the writ of *Habeas Corpus* to a Mr. Williamson, who had been committed to prison for contempt of Court. This was the famous Passmore Williamson case. Colonel Wheeler, of North Carolina, was passing through Philadelphia with three slaves, when Williamson, who was an ardent abolitionist, with the help of several negroes, forcibly carried the slaves away. Upon the petition of Colonel Wheeler a writ of *Habeas Corpus* was issued by the United States Court of the Eastern District of Pennsylvania, directed to Mr.

Williamson, who testified that he did not know where the slaves were. He was committed for contempt of court and in his turn presented a petition for another writ of *Habeas Corpus*. Judge Black's decision was wholly on the legal aspect of the writ of *Habeas Corpus*, and as an opinion on the authority of the Federal Courts under the constitution, in matters of this sort, it was not only absolutely correct but as has been said, "The doctrine of this case of national supremacy within its constitutional sphere, and the absence of power in the state authorities to interfere with the judgments of Federal Courts in regard to matters within their jurisdiction, was essentially that for which the war of the Union was fought and won." But it was slaves who had been taken; the sentiment against the fugitive slave law at that time (1855), while not so strong as it became a few years later, was violent among the extreme abolitionists, who, as it has been noted before, were not beloved by Mr. Black. The decision was not looked upon as a purely legal piece of work, but as a judicial upholding of the slave power. "The judge was right and they were wrong. Now all men approve and the case has become a landmark and text-book authority."<sup>20</sup> The idea that Mr. Black was a pro-slavery man was probably due largely to his decision in this case, although it did not touch on that question either as a part of the decision or as dicta. If he had been

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<sup>20</sup> Niles, Paper on Black, Report of Pennsylvania Bar Association, 1903, p. 400.

somewhat prejudiced in favor of the institution of slavery as a patriarchal and Biblical custom, a trip he was ordered to take for the benefit of his health, to the southern states, seems to have changed his feelings in regard to the institution itself, though not in regard to the duty of the northern states toward the southern in the matter. He was ordered to take a sea trip and sailed from Philadelphia to Charleston, South Carolina. On this southern trip he was affected by what he saw of the evils of slavery in the sundering of family ties. Great-hearted, of a very loving disposition, extremely tender toward its own, he saw human beings under circumstances in which he himself would have suffered intensely, and he could not endure the thought that such suffering might be possible. "Personally unwilling to hold even a beast of burden in oppressive bondage, nothing could induce him to condemn slave-holding in those whose consciences permitted them to practice it."<sup>21</sup> He held higher than any opinion of his own the honor of the nation; the obligation to keep faith. Speaking of the desire of the party to which he belonged to protect the southern, equally with the other states, in the exercise of their constitutional rights he said:<sup>22</sup>

We had disposed of slavery within our jurisdiction according to our sense of sound policy and justice. But we had made an express compact with the other states to leave the entire control of their domestic affairs to themselves. We kept our covenant

<sup>21</sup> Blaine, *Twenty Years in Congress*, p. 230.

<sup>22</sup> M. B. Clayton, *Reminiscences*, p. 110.

simply because it would have been gross dishonesty to break it. The Abolitionists took a different view and refused to keep faith. They swore as solemnly as we did to observe the terms of the bargain; but according to their code it was *not* a sin to violate it.

With this feeling strong within him, it was natural he should stand firmly for the rights of those whom he believed to be unjustly attacked; for the honor of those to whom he belonged; for justice and calmness and moderation. He was from first to last firmly and unalterably a Union man. It was because he believed that the radicals on both sides—the abolitionists and the secessionists—were dangerous to the Union, that he so disliked them. He foresaw the consequences of the taunts on one side, the thrusts on the other. He pleaded with them both for calmness, for deliberation. He did what lay in one man's power to stay the destructive elements. His days were days of anxiety and during the most anxious period his nights were sleepless. While those who claimed to be Unionists amused themselves playing with fire, he strove to allay the flames; while those who claimed to desire only their own rights to do as they pleased, boasted of their superiority over their fellow citizens from other states, he spoke words of calmness and claimed for all sections the right of self-government. In that time of turmoil, to be calm made a man seem traitor to both sides. He was a part of an administration which it has ever since pleased men to deride. Honest, wise, sincere, patriotic, calm in his knowledge that all his acts were inspired by a sincere

love of country, James Buchanan held the respect and the confidence of his cabinet through all the storm. When it broke, a part of that cabinet, like the country, was on one side of the dispute, part on the other. Judge Black, the Attorney-General, was a most influential member of the cabinet; that influence with the President "derived, not as has been generally supposed from close personal relations in private life, but from pure force of the intellect and character of the Attorney-General," soon became very great, and remained, perhaps, stronger than that of any other member to the end.

In the late summer and early fall of 1860 it became apparent that secession was inevitable, and that if the Republicans should be successful in the coming national election, South Carolina would go out of the Union. The question agitating the cabinet at that time was that of garrisoning the important forts within the limits of the southern states. The advice of the General commanding the armies of the United States was asked and General Scott advised that the "nine important sea coast forts in their borders should be immediately so garrisoned that it would be impossible to take any one of them by surprise."<sup>23</sup> This was not done. This fact has been held to be a reproach against the administration. Late investigations have shown, however, that there were not troops enough to have garrisoned one of the nine forts sufficiently to have attained that certainty of which the General

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<sup>23</sup> Rhodes, *History of the United States*, vol. III, 125.

spoke. The regular troops were needed on the frontier, even if they had been sufficient. The fear of the tomahawk and the scalper had not yet died out in the land; the west was still in the shadow of the red man. These were the facts, irrespective of the proper policy that should be pursued when hostilities may be hastened or averted by any administrative act. To those who most desired the preservation of the Union it seemed that the sending of troops to these forts at that time would have precipitated a conflict not then known to be inevitable. Attorney-General Black, however, felt that General Scott's advice was wise. November 9th, according to the diary of Floyd (then Secretary of War), Attorney-General Black in cabinet meeting, strongly urged "sending at once a strong force into the forts in Charleston Harbor."<sup>24</sup> He was for conciliation as long as conciliation tended to the preservation of the Union; he was for preserving the Union by the use of every honorable weapon when conciliation was no longer possible. Even among the cabinet there was a difference of opinion in regard to the right of secession; both Buchanan and Black denying the right of any state to secede. The President and his Attorney-General were as one in their views on this question, but they differed as to the way in which that opinion should be expressed. November 17th, President Buchanan asked Black for an official answer to the following questions:—

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<sup>24</sup> Rhodes, *History of the United States*, vol. III, 126-127.



1. In case of a conflict between the authorities of any State and those of the United States, can there be any doubt that the laws of the Federal Government, if constitutionally passed, are supreme?

2. What is the extent of my official power to collect the duties on imports at a port where the revenue laws are resisted by a force which drives the collector from the custom house?

3. What right have I to defend the public property (for instance, a fort, arsenal and navy yard), in case it should be assaulted?

4. What are the legal means at my disposal for executing those laws of the United States which are usually administered through the courts and their officers?

5. Can a military force be used for any purpose whatever under the Acts of 1795 and 1807, within the limits of a state where there are no judges, marshals or other civil officers?

Judge Black answered the first question by saying:

The will of a State, whether expressed in its constitution or laws, cannot, while it remains in the Confederacy, absolve her people from the duty of obeying the just and constitutional requirements of the Central Government.

In regard to the collection of the revenue, he said:

You can now, if necessary, order the duties to be collected on board a vessel. Your right to take such measures as may seem to be necessary for the protection of the public property is very clear. . . . The right of the General Government to preserve itself in its whole constitutional vigor by repelling a direct and positive aggression upon its property or its officers cannot be denied.

Mr. Black affirmed the right of the General Government to suppress all obstructions to the execution

of the laws of the United States, and to maintain possession of its public property, but he rejected the idea that the President or Congress could make war upon a state.<sup>25</sup>

This distinction was from the first, and always remained, of the utmost importance. It became entirely consistent with the recognition, for the time being, of a condition of territorial civil war, carried on by the lawful government of the Union to suppress any and all military organizations arrayed against the exercise of its lawful authority; consistent with the concession of the belligerent character to the Confederate government as a *de facto* power having under its control the resources and the territory of numerous States; consistent also with the denial to that government of any character as a power *de jure*, and alike consistent with a purpose to suppress and destroy it. So far as the war subsequently waged was carried on upon this basis, it was carried on within the limits of the Constitution, and by the strictest constitutional right. So far as it was carried on upon any other basis, or made to result in anything more than the suppression of all unlawful obstructions to the exercise of the Federal authority throughout the Union, it was a war waged outside of the Constitution, and for objects that were not within the range of the powers bestowed by the Constitution on the Federal Government. In a word, the Federal Government had ample power under the Constitution to suppress and destroy the Confederate government and all its military array, from whatever sources that government or its military means were derived, but it had no constitutional authority to destroy a State, or to make war upon its unarmed population, as it would have under the principles of public law to destroy the political autonomy of a foreign nation with which it might be at war, or to promote hostilities against its people.

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<sup>25</sup> Curtis, Life of Buchanan, vol. II, 326, 327.

The distinction here made was not understood by most of the people, and not understanding it they necessarily misunderstood the attitude of those who held to it. The people, however, did generally understand that this opinion of Judge Black was a vigorous one, and that the President had the power to act in defense of the property and rights of the General Government.

On December 3d, 1860, Mr. Buchanan presented his annual message to Congress. Before doing so, he read it to the cabinet. Mr. Black made an objection to an expression which implied that Congress had no "power to coerce a state into submission, which is attempting to withdraw, or has actually withdrawn, from the Confederacy." Mr. Black felt that the expression might be misunderstood, and in that opinion he was justified by events. Mr. Curtis contends that it was not misunderstood, but that "nearly the whole Republican party, after the message became public, without any rational excuse for such a misconstruction, saw fit to treat the message as a denial by the President of any power to enforce the laws against the citizens of a State after secession, and even after actual rebellion." If the Attorney-General foresaw that there would be such general misconstruction, even though it might be wilful, it would seem that he was justified in his objection. To play into the hands of the enemy by giving them an opportunity for misconstruction was an error of judgment at such a critical moment and so it seemed to Mr. Black.

December 15th, 1860, General Cass, who held the portfolio of Secretary of State, resigned, believing that the President was in error in sending reinforcements to Charleston harbor, as he thought that there was then no need to resort to force for the protection of the property of the United States. Two days later, December 17th, 1860, Judge Black was appointed Secretary of State, and held that position for the remainder of the presidential term of Buchanan.

On the 20th of December, 1860, the Convention of South Carolina adopted an ordinance of secession, and on the 22d, three commissioners were appointed to treat with the government of the United States. They arrived in Washington on the 26th. The day after they arrived the news reached Washington of the removal of Major Anderson from Fort Moultrie to Fort Sumter, accompanied by the information that the State government had seized Fort Moultrie, Castle Pinckney, the custom house and post-office. It was claimed that President Buchanan had made an agreement with certain members of Congress from South Carolina that the *status quo* in Charleston harbor, in respect to these forts should not be changed. The South Carolina Commissioners asserted that the removal of Major Anderson to Fort Sumter was a violation of this pledge. The President, relying not only on his recollection, but on his written memoranda of his conversation with the South Carolina members of Congress, which completely refuted the assertion, did not, in the first draft of an answer

to the Commissioners, which he prepared with his own hand, repel the assertion as flatly and explicitly as he might have done.<sup>26</sup> To three members of his cabinet, Judge Black, Mr. Holt, and Mr. Stanton, this omission was a fatal defect in the paper. Judge Black presented a paper embodying his objections, to the President. He not only referred to the defect mentioned, but also objected to the President's having any negotiations with the Commissioners. It has been thought that these three members of his cabinet believed that the President was on the point of reversing his position, and that he would ultimately admit the right of the states to secede. Mr. Curtis says, "In this it is certain they were mistaken. The President had not contemplated any such change in his position."<sup>27</sup> If they did feel that it was possible that he might so change his position, the necessity of immediate action on their part is apparent. This first draft of an answer to the Commissioners was read to the cabinet on the evening of December 29th.<sup>28</sup>

That night Judge Black spent in deep reflection. His feeling of personal devotion to Buchanan and his sentiment of duty to the country wrestled together. . . . In the morning his mind was made up. He told Stanton, Holt and Toucey that, regarding the President's purpose as fixed, he had determined to resign.

Mr. Toucey informed the President, who sent for Black. This interview may well have been painful

<sup>26</sup> Curtis, *Life of Buchanan*, vol. II, 385.

<sup>27</sup> Curtis, *Life of Buchanan*, vol. II, 383.

<sup>28</sup> Rhodes, *History of the United States*, vol. III, 231.

for Judge Black, as it has been represented to have been. Yet, it may be doubted that those who have represented it as a conflict of convictions were wholly right; rather it seems to have been a conflict of policies, in which the President was wise enough to yield to the influence of a mind he knew to be wholly honest, utterly loyal, and as desirous as his own of acting within constitutional rights. And he did yield, giving to Judge Black the draft of the paper that he might make the changes immediately. "Mr. Black went to the Attorney-General's office and there wrote the paper, which Mr. Stanton copied as rapidly as the sheets were thrown to him."<sup>29</sup> Mr. Rhodes says:<sup>30</sup>

Black showed a perfect comprehension of all the points involved; he understood thoroughly the rights and duties of the federal government; he saw with unerring sagacity the correct policy to be pursued: and all this he expressed with such cogency that this memorandum, constituting as it did the turning point of Buchanan's policy, and preventing an abject compliance with arrogant demands, is worthy of the most careful consideration and the highest praise. In unanswerable logic he vindicated the national doctrine, justified and commended Major Anderson in the strongest terms, refuted with crushing force the claim of South Carolina, and ended with: "I entreat the President to order the *Brooklyn* and the *Macedonian* to Charleston without the least delay, and in the meantime send a trusty messenger to Major Anderson to let him know that his government will not desert him. The re-enforcement of troops from New York or Old Point Comfort should follow immediately. If this be done at

<sup>29</sup> Essays and Speeches of J. S. Black, by C. F. Black, 13.

<sup>30</sup> Rhodes, History of the United States, vol. III, 231-233.

once all may yet be not well, but comparatively safe. If not, I can see nothing before us but disaster and ruin to the country."

This, the opinion of one of the latest and most careful of our historians, shows the distance we have come from the times in which it was the custom to represent Judge Black as a part of a temporizing and inadequate administration. It does justice to Judge Black at the expense of the President, but Judge Black himself did not desire justice of this sort. In later life the attitude of the press and the politicians toward the administration of which he had been a member, was to him a most bitter injustice. This was what he said in a letter to Mr. Wilson long after the war was over, in regard to President Buchanan and that administration: <sup>31</sup>

In the first place Mr. Buchanan was born of Christian parents and educated in a Christian community. All his lifetime, and at the moment of his death, he felt that fear of God which a respectable authority has declared to be, not weakness, but the "beginning of wisdom" and the only source of true greatness. . . . Apart from the religious obligation of his oath, he loved the Constitution of his country on its own account, as the best government the world ever saw. I do not expect you to sympathize with this feeling; your affections are otherwise engaged. . . . The proofs of his great ability and his eminent public services are found on every page of his country's history from 1820 to 1861. During all that long period he steadily, faithfully and powerfully sustained the principles of free constitutional government. This nation never had a truer friend, nor its laws a defender who would more cheerfully have given his life to save them from violation. No man was ever slandered

<sup>31</sup> *Essays and Speeches of J. S. Black*, by C. F. Black, 247, 248, 251.

so brutally. His life was literally lied away. In the last months of his administration he devoted all the energies of his mind and body to the great duty of saving the Union, if possible, from dissolution and civil war. . . . The accusation of timidity and indecision is most preposterous. . . . He never found it necessary to cross his own path or go back upon his pledges. His judgment was, of course, not infallible; and in 1861 he announced a determination with reference to the South Carolina Commissioners which I and others thought erroneous but unchangeable. Most unexpectedly, and altogether contrary to his usual habit of steadfast self-reliance, he consented to reconsider and materially alter his decision. This change, and all the circumstances which brought it about, were alike honorable to his understanding and heart.

The man who could write like this of the man beside whom he struggled for his country's life and honor would accept of no praise which involved the discredit of that man. Together they worked, and together they failed, to save that country from the evils other men could not foresee, or seeing, would not avoid. The memorandum, Stanton and Holt concurring, and the paper, changed in accordance with Judge Black's opinion, were delivered to the commissioners Monday, December 23d. The reply of the Commissioners betrayed their disappointment. They had hoped for an answer in a different tone; they heard the ring of a new voice; the note of a new certainty. The diplomacy of Buchanan, trained diplomat that he was, had a different sound when fused with the phrases of a mind like that of Judge Black. The new note, characteristically, had a sting in it, and they "let their bitter disappointment get the better of



their native courtesy.”<sup>32</sup> The cabinet heard their answer read with deep indignation. The President declined to receive it and sent it back to the Commissioners. The North, depressed, feeling that it had no leader (for detraction had already been busy with the President), received with joy the news of the support of Anderson, and the vigorous action of the administration. To quote again from Mr. Rhodes:<sup>33</sup>

No one imagined that the difficulty was solved, but all felt that their government had adopted a manly tone, and that they need no longer hang their heads with shame as they gave heed to the opinion of Europe. For the change of policy that caused this revulsion of feeling, for the vigorous assertion at last in word and in deed that the United States is a nation, for pointing out the way in which the authority of the federal government might be exercised without infringing on the rights of the states, the gratitude of the American people is due to Jeremiah S. Black.

That gratitude he did not receive. Instead he was traduced and reviled, and for many years rated as the betrayer of his country. The passions of the war party made them blind to every virtue, every heroism, of their opponents. The literature of that party and of the next decade was devoted to the exploitation of the heroes of the war, and of the politicians made by the war. All the later years of the life of Judge Black were devoted to the refutation of these slanders, and to the condemnation of the slanderers, who made political capital out of denunciation of their opponents.

<sup>32</sup> Rhodes, *History of the United States*, vol. III, 235.

<sup>33</sup> Rhodes, *History of the United States*, vol. III, 236.

The administration was drawing to an end. Secession was an accomplished fact, although the guns which were to open on Fort Sumter were still pointing in a menacing silence from the sand hills of Sullivan's Island.

On the Fourth of March, 1861, Buchanan laid down the cares of office and a new administration came into power—a new era was begun. Six states were now in actual revolt; five more were ready to join them. In another month the Civil War would begin.

To Judge Black the triumph of the Republican party in the national election of November, 1860, was an unrelieved evil. He considered it to be natural that the southern states should be excited and alarmed over the election of Lincoln. The views of the Republican party, and of Lincoln as its exponent, he believed to be inconsistent with loyalty to the Union. In this belief he laid aside the office of Secretary of State, but not its cares. The burden of fears, the sense of coming horrors; the grief of seeing his beloved country torn in two, fighting in what he feared might be its death struggle, he could not lay down. Honest to the utmost meaning of the word, he left Washington poor in pocket, having in the last few years lost the small savings he had made in the long years in practice and on the bench. These savings amounted to about twenty-one thousand dollars, and it was all that stood between himself and his family, and poverty. He had been for many years on the

bench or in office, and he had some doubts of his ability to create a practice for himself. It is a commentary upon his character that the retiring Secretary of State was utterly innocent of any influence, any avenue of acquiring a practice, other than to go back to the home of his early struggles, and there, as poor as when he began his work at the bar when twenty years of age, poorer than when he took office under the United States, to build up once more the practice of a country lawyer. The rival attractions of the two little towns of Lancaster and York pressed their claims upon him, and in considering the claims of the white rose and the red, the white rose of York won, "Partly because he found there a house that especially suited him, at a reasonable rent, partly, perhaps, because he had a prejudice in favor of the town which had been his mother's birthplace." The great, hearty, genial nature of the man here, for a time, suffered an eclipse. He was utterly depressed. Outside, the great world in which he had lived, for which he had labored, thought of him as disloyal to the things for which he would have given up, had, in fact given up, more than life. And, to his mind, his sacrifice had been in vain; that world was rushing to destruction.

The pressure of personal poverty to a man who loved his family with so great a devotion, who was so delicately alive to every claim as husband, father, and citizen, was overpowering. The first year of private life in the new home was a depressing

one. Before it had ended he had received the appointment as Reporter of the Supreme Court of the United States, which has given us the two volumes of Reports known as "Black's Reports," and the immediate pressure of pecuniary needs was over. But this was not work for a man of his mental stature. In his modesty he had undervalued to an almost absurd extent the reputation he had won, the impression he had made, in the state of his birth and the country he had served. Practice came to him in an overwhelming flood. He was forced to resign the office of Reporter, leaving the two volumes of Reports as a record of mechanical work well done by a master hand. He had done good work as a judge of the common pleas, good work as a judge of the Supreme Court, good work as attorney-general, good work—it is not often given to a man that he may save his country—as Secretary of State, good work as a Reporter, and now he was to take up the work that generally precedes all that, and to do work as attorney, as writer and as private citizen, that was to be as good in its different way, as all that had gone before.

The California land cases had occupied him greatly when he held the office of attorney-general. This work now came to him as to its natural master. In his official position he had detected fraud, defended the weak, condemned the dishonest. So to him now came all those whose honest titles were in danger; all those whom fraudulent claims menaced; all those who needed a champion for their just claims.

The fees in some of these cases were large, amounting in one case, it is said, to one hundred and twenty-five thousand dollars. He was never to know the pressure of financial distress again. Not that he ever became very rich, for his was not a nature which could stop or stoop to amass riches. He felt a greater zest for those cases in which he could expect no material reward than in those rich in prospective fees. It is not an uncommon characteristic of such natures, though the natures themselves are all too rare. The joy of doing the work is dulled rather than increased by the thought of any lesser reward than that which comes from the act itself.

The Osage Land Case, was one of those less profitable, but also one of the more noted, causes of that time. The inhabitants of five counties in Kansas, *bona fide* settlers and owners, who had bought and paid for the land, were in danger of being ejected from their homes by certain railroad companies, who unjustly claimed the Osage lands. Judge Black won the victory for these settlers and sent to his waiting clients this picturesque telegram:

Opinion by Davis. Miller affirmed. Lawrence sustained. Shannon honored. Peck glorified. Justice vindicated. Truth triumphant. Settlers protected. The Lord God Omnipotent reigneth.

He was triumphant when the honest were protected and justice vindicated, and his joy was as exuberant as his scorn and, at times, his dejection. This telegram shows most vividly his unselfish, almost re-

ligious fervor in the cause of the distressed and helpless.

Not alone in such cases as these did his work lie. Out of the troubles of the war grew many usurpations of the military upon the civil law. Naturally in such cases Judge Black was retained to appear against the government, for in them all it had overstepped the bounds set to it by the constitution. Probably the three most celebrated cases of this period in which he appeared were the Blyew Case, the McArdle Case, and the Milligan Case. They all affected directly the personal liberty of the plaintiffs.

The case of *Ex-Parte* Milligan,<sup>34</sup> is one of great historical interest. Milligan, a citizen of the United States, a resident and citizen of the State of Indiana, was arrested October 5th, 1864, at his home, by the order of a military commander of the District of Indiana, and confined in a military prison. On the 21st, of the same month he was placed on trial before a military commission convened in Indianapolis, and charged with conspiracy, inciting insurrection, affording aid and comfort to rebels, etc.; the substance of them all being that he was a member of a secret society known as the "Order of American Knights," or "Sons of Liberty," and that he had aided them in committing various acts alleged to be treasonable. Milligan was a private citizen, in no way connected with the military service of the United States. At the time of his arrest the courts were open; there

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<sup>34</sup> 4 Wallace's Reports, 2.

was no armed force of the enemy within their borders, and no rebellion in the State. Milligan was found guilty on all the charges, sentenced to suffer death by hanging, and the sentence was ordered to be executed on Friday, May 19th, 1865. Milligan filed his petition for a writ of *Habeas Corpus*, May 10th, 1865. There was an imposing array of counsel on both sides. That of the government included B. F. Butler; that of the petitioner included David Dudley Field. But Judge Black seems to have focused the eyes of the country. We are told that, "Judge Black attacked with irresistible power, the constitutionality of the proceedings of the military commission. His address to the court was indisputably the most remarkable forensic effort ever made by man in this country. For eight hours, he stood before that august tribunal delivering his address, without a solitary note or reading from a book; and yet he presented an array of law, fact, and argument, with such remarkable force and eloquence, as startled and bewildered those who listened to him. . . . Freedom was his client. The great cause of Constitutional Liberty hung upon that single life." <sup>35</sup> Some of the phrases of this remarkable argument have become a part of legal history of the United States. To-day, it is probable that the student will find those bearing on the condition of the country, and showing the feeling of the time, the most

<sup>35</sup> Address by the Honorable Levi Maish of York; M. B. Clayton, *Reminiscences*, p. 131.

interesting. Regarding the abrogation of trial by jury he said:—

This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The President or the Congress can provoke it, and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a single gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow, to stab it in the back.

In such a cause as this the great oratorical powers of Judge Black were at their best; all the strongest elements of his nature were enlisted in the struggle, and as he was himself inspired, so he inspired all who heard him. One of his friends, Colonel John F. Lee, said of the oration from which we have quoted:—"That made an end of the Military Commissions, organized to put to death innocent men and women, and restored to this nation the adminis-



tration of law in political offenses by impartial juries and learned judges.”

The *McCardle Cases*<sup>36</sup> brought before the court the validity of the Reconstruction Acts. *McCardle* was convicted by a Military Commission, of disturbing the public peace, inciting insurrection, disorder and violence, in violation of these acts. The State of Mississippi, where *McCardle* was arrested, was, at the time, under military control. A writ of *habeas corpus* was issued from the Circuit Court. That court remanded the prisoner to the custody of the Major-General commanding the District, and *McCardle* appealed. The case came before the Supreme Court of the United States on a motion to dismiss the appeal. Judge Black made the argument, and it was believed the cause was won, but before the court announced its judgment, Congress enacted legislation which divested the jurisdiction of the court, so the appeal was necessarily dismissed. Justices Grier and Field protested, Justice Grier saying:—

This case was fully argued in the beginning of this month. It is a case that involves the liberty and rights, not only of the appellant, but of our fellow citizens. The country and the parties had a right to expect that it would receive the immediate and solemn attention of this court. By the postponement of the case we shall subject ourselves, whether justly or unjustly, to the imputation that we have evaded the performance of a duty imposed on us by the Constitution, and waited for the Legislature to interpose to supersede our action, and relieve us from our

<sup>36</sup> 6 Wallace's Reports, 318; 7 Wallace's Reports, 506.

responsibility. I am not willing to be a partaker of the eulogy or opprobrium that may follow. I can only say,

*"Pudet haec opprobria nobis.*

*Et dici potuisse et non potuisse repelli."*

The Blyew Case,<sup>37</sup> involved a construction of the "Civil Rights Bill." Blyew was indicted and tried in one of the Federal Courts of Kentucky. He was sentenced to be hanged. Judge Black made the argument, contesting the jurisdiction of the court on the ground that the bill in question was unconstitutional, and also that the case could not be brought under its provisions as it did not affect negroes. The court gave judgment on the second point, thus avoiding the necessity of passing upon the validity of the bill. The argument was declared by one who heard it to be "the finest combination of law, logic, rhetoric and eloquence, I have ever listened to."<sup>38</sup>

The arguments of Judge Black in regard to the Reconstruction Acts, and the Civil Rights Bill, in these cases, were those of a man devoted to the theory of 'states' rights, and of a bitter, possibly extreme, assailant of the policy of reconstruction. He looked upon the whole system of reconstruction legislation as an abomination. Not an abomination because it was contrary to that which he believed politic, but because it seemed to him to overthrow the whole theory upon which the republic rested.

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<sup>37</sup> 13 Wallace's Reports, 581.

<sup>38</sup> Address by the Honorable Levi Maish of York; M. B. Clayton, *Reminiscences*, pp. 128-9.

Judge Black was retained by President Johnson as counsel in the impeachment trial, but he very early severed his connection with the case. He also acted as counsel for Mr. Belknap, in his impeachment, and in this case he was a most active member of counsel.

In 1874 Judge Black was appointed by the State of Maryland, one of the arbitrators to settle the controversy between that state and Virginia. This commission was several years examining the authorities and deciding upon the merits of the dispute. It met at Washington, Cape May, Philadelphia, and Saratoga, and their meetings in these various places are said to have been most agreeable. The other members of the commission were Governor Graham of North Carolina, and Governor Jenkins of Georgia.

November 12th, 1872, the Convention to revise the Constitution of Pennsylvania met at Harrisburg, the capital of the state. Judge Black was a delegate at large, and was in his place at the opening of the session, and his first vote is recorded on that date. He was appointed on the Committee on Declaration of Rights, but declared that the convention had no power to change the existing declaration.

In that convention he was the most picturesque and striking figure. When he spoke he commanded instant attention, even though his hearers must, many of them, have writhed under his scathing invective. His opponents, and they were many, for political opinions, directly the reverse of his own, had now dominated the state for some years, never rose to answer

him without prefacing their remarks with an allusion to his eminence at the bar; his intellectual superiority; his learning, or his character. A close examination of the printed debates shows him to have been considered by his colleagues in the convention as one set apart by virtue of what he had done, and what he had become. They looked up to him, but they refused to be lifted to his level. He accepted their respect, their friendship and their tributes in the most friendly way, but the spirit in which he accepted them had a tinge of bitterness. He told them that they would repudiate his measures and remain satisfied to stay on the level they then occupied. And he was right. The corruption of the legislature had become such a by-word throughout the nation that the members of that convention stood up and condemned it in the most vivid language. Probably few used language more vivid than Judge Black himself. In one of his speeches he said:—

After all that has been said upon this floor it cannot be denied that the Legislature of the State of Pennsylvania has habitually and constantly, for the last twenty-five years or more, betrayed the trust reposed in its members; and this has gone so far, that we must have reform if we would not see our institutions perish before our eyes. . . . The evil fame of this thing has gone forth through the length and breadth of this country, insomuch that the gentleman from Indiana (Mr. Harry White) vouches for this statement: That when one of his colleagues in the Senate was traveling in Connecticut, and it became known that he was a member of our Legislature, that fact alone raised a presumption against his honesty so violent, that

there was some hesitation about letting him go into an unoccupied room, lest the portable property to be found there might disappear when he went out. . . . But, I do not know that we ought to blame the members of the Legislature too severely. Something ought to be allowed for the temptations with which they are surrounded. They walk among snares, and pit-falls, and man-traps. In fact they do not represent us. We are not governed by the men we send there. Our masters are the members of the lobby. They are organized into a third house, whose power is overshadowing and omnipotent. They propose the laws that suit themselves, and the interested parties who send them there. The other Houses simply register their decrees. That our rights and liberties should be in such hands is disgusting in the extreme, for they are generally the most loathsome miscreants on the face of the earth.

This was spoken on March 10th, and at that date he still had some hope that the work of the convention would be of value, for he said:—

Shall we stand by and see this prodigious ruin rushing down upon us without an effort to arrest it? No, surely not. But seeing that we are sent here for the very purpose of stopping it, we will perform our duty, and, with the help of the living God, we will succeed in our mission. We will deliver our good old Commonwealth from the body of this death.

He went on to outline his scheme for helping to restore the state to good and regular standing in the community of states. He divided his remedies into five measures, which he hoped might be adopted in some form. These were:

1. Confine the power of the Legislature within limits as narrow as possible, consistent with a proper regulation of our affairs.

2. Prescribe certain forms of proceeding which will insure deliberation and publicity.

3. Define bribery so as to include all sorts of corruption.

4. Extinguish the lobby at once and forever, by making all private solicitation of members by interested parties or their agents a criminal offense.

5. Make all fraudulent acts of the Legislature void.

6. Swear or affirm every member before he takes his seat that he will not only support but obey and defend the Constitution in all things.

7. Require every member at the close of his last session to render an account of his stewardship to his own constituents at home.

He supported these measures with all his persuasiveness and argumentative power, and the first two items may be said to have been in a measure incorporated in the Constitution. The remainder, although he urged, entreated, almost prayed the members of the convention to define bribery so as to include all sorts of corruption, and to extinguish the lobby "forever" were not carried out. On June 11th, he said:—

I wish it to be known that I heard the remarkable speech made by the gentleman from Centre, and that I dissent from all that part of it, which may be called the political morals of it. He thinks that it does not make any difference at all whether the Legislature is corrupt or honest; that although it may be true—and that is a fact that he does not undertake to deny—that the Legislature of this State is utterly corrupt, we ought not to say anything about it. He is even disposed to rebuke men who do speak of it.

We have become, says he, a by-word all over the country. No doubt, he is right about that. We are a by-word and a

hissing and a scorn, not only all over this country, but all over the world. But, instead of looking that fact fairly in the face and trying to get some kind of remedy for it, he desires to ignore it altogether. It is the cancer at the heart of the Commonwealth; it is a fretting leprosy; it is destroying the life of the people; it is consuming their life's life, their good name and their liberty; but he thinks it wrong to oppose it or prevent it from having its free course; we should court the ruin it is sure to bring upon us.

In my opinion, Mr. Chairman, we are here mainly for the purpose of furnishing, if we can, some peaceable remedy for that great evil. The people had no other object in calling this convention except that and one other; the other was to purify the elections. If we fail to do these two things, then we, the members of this Convention, will become a hissing and a by-word and a scorn.

September 30th, he spoke most strongly on the subject of bribery; he felt that the convention was on the point of making a very grave error in the section on bribery as it was reported, and he was aroused to an intensity of feeling which showed in his speech:—

Now, sir, for us, the members of the Convention, to have come here and insert such a definition of bribery as that into our Constitution in such times as these, when the corruptions of the Legislature are the fretting leprosy of the age that we live in, and when they are threatening us with total destruction, is, I repeat, such a disgrace as never before blackened the brow of any public body in this country.

On October 1st, he spoke again on the same subject:—

It is manifestly the intention of this body that the third House shall be permanent. All the votes given to-day indicate that.

Every proposition made by a friend of reform is answered by a thundering *no*. Our opponents rush at us and run over us like a herd of buffalo on a western prairie. They crush us down by mere weight of body and hardness of hoof. (Laughter.) . . . Here they come with horns down and tails up. (Much laughter.) I mean to get out of the way.

There was "laughter," and "much laughter," but there was little shame. The system was fastened upon the state, and that state was to reap the benefit of it in the years to come. Possibly had there been less laughter, the future had held less of shame.

The "I mean to get out of the way," was not an empty form of words. The next day, October 2d, 1873, Judge Black sent in his letter of resignation from the Convention. It was not at once accepted, but at last the Convention learned that he meant what he said and they accepted the resignation of that member who would have led them out of the wilderness had they so desired, but who could not follow where they led.

The members of the Convention had voted themselves fifteen hundred dollars as compensation for their labors. Judge Black contended that the Legislature should fix their compensation, and that body not having acted, they had no power to do so. He therefore, refused all compensation, although most, if not all, the other members accepted their share.

In relation to his attitude upon the subject of bribery in the Constitutional Convention, he afterwards made some memorable comments in his argument in the Belknap Impeachment trial. He was speaking



of the sentiment in regard to an officer of the public service accepting a present, and said:—

I was a member of the Pennsylvania Convention to reform the constitution of that State. I tried my best, and so did others of greater influence and more ability than mine, to get inserted into the organic law a definition of bribery which would include presents of any kind, given under any pretense whatever, so that no officer could ever, without violating his oath and exposing himself to the danger of a prosecution which would send him to the penitentiary, receive money from anybody. But I found myself shooting at the stars. I was told that I was trying to make the officers of the Commonwealth righteous overmuch; that the mere receipt of money was of itself an innocent thing unless there was a corrupt contract or a corrupt intent, but when the corrupt intent did exist, it ought to be proved like any other fact which is necessary to make out the guilt of the party. By this and other similar arguments a measure which I thought a very important one was thrown out.

There had been one other pet measure of his which was also thrown out, and by arguments of much the same caliber. His daughter speaks of this measure in her *Reminiscences*:<sup>39</sup>

His conspicuous and favorite, but defeated measure was — “Swear and affirm every member of the Legislature before he takes his seat that he will not only support but obey the Constitution in all things, as well as require every member at the close of his last session also to render an account of his stewardship to his own constituents at home. Make him swear or affirm specifically that he *has* obeyed the Constitution; that he has not listened to private solicitation, or taken any bribe, or knowingly done any other act in his official capacity interdicted by

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<sup>39</sup> Page 165.

the fundamental law. If his hands are clean he will be willing to show them. If they are not, and he declines to show them, the public can have no further need of his services, and he should not be eligible to the same or any other office.

It was impossible that Judge Black should strongly influence the deliberations of a body of men so controlled by motives and influences that were never able to gain any hold upon his nature. But his influence has been potent in the memories of those who saw and heard him there; it has not lost its strength or been forgotten. To those who, since that time have struggled for the objects, adopted the ideals, loved the things he loved, that influence has been potent to inspire, to encourage, to urge them on to accomplish their work. He could not mold the measures of that Convention, but he had his part in molding the minds of the men who met him there, and who felt that they there saw civic honesty incarnate.

The ten years that remained of active life for Judge Black were busy, useful, and happy years for him. A large practice took up the major portion of his time, that practice being very largely of the character already noted.

No man took a greater interest in the crisis created by the situation of the states at the period of reconstruction than did Mr. Black. The intensity of his democracy was a part of the intensity of his temperament upon any question which he felt to be vital to the life of the people—life here and hereafter. In his conduct of such cases as those of Mc-

Cardle and Milligan he had shown the severity of his disapproval of reconstruction methods; the reason for that disapproval; the justification of its severity. The ultimate—and it may be said—the self-destructive, culmination of the evils of reconstruction was the election of 1876, with bayonets at the ballot boxes, and the force of the Federal government used at every precinct in the southern states. From such conditions there could come but one result. The election must be declared to be in favor of the power behind the bayonet, and that it was so declared was to Judge Black ever afterwards “the great fraud.” He was of counsel for President-elect Tilden before the Electoral Commission, and there denounced the fraud about to be consummated. Later he issued an article on the “Great Fraud.” Bitter, biting, almost brutal in his wrath against the evil that sat in high places and complacently claimed the reward of its crimes, his arraignment never overleaped the bounds of truth. At that day it doubtless seemed to many that it was unjust, violent and untrue. He lived long enough to see the symptoms of a new sentiment, a fairer era, and the dawn of a day which should be able to judge justly and acknowledge the crimes that had been committed in the evil days. Mr. Rhodes in his *History of the United States* accepts Mr. Black’s statements in the “Great Fraud,” and adopts the word fraud to describe the transaction. Mr. Black’s article on the “Great Fraud” is too strong, too closely connected in

all its parts to admit of many extractions. Its last paragraph was this:

If the majority of the commission [the electoral commission] could but have realized their responsibility to God and man, if they could only have understood that, in a free country, liberty and law are inseparable, they would have been enrolled among our greatest benefactors, for they would have added strength and grandeur to our institutions. But they could not come up to the height of the great subject. Party passion so benumbed their faculties that a fundamental right seemed nothing to them when it came in conflict with some argument supported by artificial reasoning and drawn from the supposed analogies of technical procedure. The Constitution was in their judgment outweighed by a void statute and the action of a corrupt returning board.

Let these things be remembered by our children's children, and if the friends of free government shall ever again have such a contest let them take care how they leave the decision of it to a tribunal like that which betrayed the nation by enthroning the *Great Fraud* of 1876.

Another controversial article written by Judge Black was his *Defense of the Faith*, which was written in answer to a paper by Robert Ingersoll. As has been stated, he was an absolute believer in the tenets of that church known to the world by the name of its founder, Thomas Campbell. In 1856, in a speech before the Phrenokosmian Society of Pennsylvania College, he said, after describing the religious persecutions from which the colonists had suffered, and from which they had fled to our shores:—

Among them were three immortal names that will be venerated as long as the earth contains one friend of human liberty. These

were Cecilius Calvert, William Penn, and Roger Williams—a Catholic, a Quaker, and a Baptist. There was no prince or statesman in all Europe that was worthy to stoop down and unloose the latchet of their shoes. Theirs was the greatest improvement in the science of government that was ever made. It was a new era of peace on earth and good will to man, fit to be celebrated on the harps of angels. You may talk of other compromises; but the greatest compromise of all was that by which the fighting sects agreed to disarm and cease their barbarous hostility. The great men I have named were not only *our* benefactors, but the profoundest gratitude is due to their memory from the whole human race. Their example has shamed the civilized world, if not into freedom, at least into peace.

Intensely as he felt the truth of religion as he saw it, he was not of those who would spread their own belief by denying freedom of belief to others.

The long-dreamed-of trip to the old world was realized in 1880, and was enjoyed as only such men can enjoy such things. Intensely American, his attention was given largely to the social conditions of the people he saw about him. He realized that:—

He who crosses the sea may change his climate, but not his mind—in other words, he takes his prejudices along with him wherever he goes. Mine adhere to me with as much tenacity as if I had stayed at home; and some of them, particularly that one in favor of honest constitutional government, is rather intensified than weakened.

While abroad Judge Black heard of the nomination of Garfield, for whom he felt a deep friendship, and with whom he was on terms of great intimacy; but General Hancock was also a friend, and at the same time on what Judge Black considered the only

possible side in politics, so that after this nomination the intimacy with Garfield ceased, and the two men never saw each other again.

The winter of 1882-3 he spent in Washington, but in the midst of the season, and while apparently in the full vigor of health and strength, he went home to his beloved Brockie, and there spent a few quiet days in remodeling his will.

In March, 1883, he went to Harrisburg and there, before the Judiciary Committee of the Senate, he made one of those fiery appeals to the justice, honor, and intelligence of the people against corporate greed, which had made him both famous and feared. He declared that it was untrue that he desired to destroy any corporate interests, but that he was "prejudiced in favor of natural justice and equality." He reiterated his belief that the railroads were public property; "the proprietary right remained in the state, and was held by her in trust for the use of the people."

The corporations deny that they owe any responsibility to the State, more than individuals engaged in private business. They assert that the management of the railroads being a mere speculation of their own, these thoroughfares of trade and travel must be run for their interest without regard to public right. If they take advantage of their power to oppress the labor and overtax the land of the State; if they crush the industry of one man or place to build up the prosperity of another; if they plunder the rich by extortion, or deepen the distress of the poor by discriminating against them, they justify themselves by showing that all this was in the way of business; that their interest re-

quired them to do it; that if they had done otherwise their fortunes would not have been so great as they are; that it was the prudent, proper, and successful method of managing their own affairs. This is their universal answer to all complaints. Their protests against legislative intervention to protect the public always take this shape, with more or less distinctness of outline. In whatever language they clothe their argument, it is the same in substance as that with which Demetrius, the silversmith, defended the sanctity of the temple for which he made shrines, "Sirs, ye know that by this craft we have our wealth."

It may be that Judge Black did not realize how long the day of the corporations was to be; but he had done his part bravely and well to bring that day to an end. Then he went home to Brockie, which he found lovelier than ever. The deep green woods, the trees loaded with fruit—trees he had planted and watered and tended with his own hands—the wheat promising as never before; the garden a delight. Here he sat down to that writing which had been the occupation of those hours he could take from his professional work;—his political essays and letters alone make a mass of work which should have been enough to engage his time almost continually had he had no other work to do. The echoes of the questions aroused by the war had not yet died out, and he busied himself with an answer to some statements made by Jefferson Davis. Sitting in his library on the eleventh of August, his thoughts turned to those old questions of constitutional law which had come to him for an answer in the most critical period of his public life, and now, as then, he an-

swered them without a shadow of doubt or uncertainty. He could allow, as he said, no argument, it was too simple:—

The States have rights carefully reserved, and as sacred as the life, liberty and property of a private citizen, but to say that among these rights is that of expelling from its territory the officers of the General Government, arresting the execution of its laws, and abolishing its constitution, is to utter an absurdity too absolutely gross to be entertained by any man who has bestowed one rational look upon the subject. This is a conclusion too simple to allow of argumentation, either pro or con. It is not with me a matter of mere belief. I know it as every man knows how many fingers he has to his hand as soon as he counts them.

He had just received the eminently calm, able and just life of Buchanan by Mr. Curtis. In his haste to read it he tore the uncut volume apart with his finger—a habit he had—yet he did not look for the account of his own work under that administration, but for the religious experience and death of one who had been his friend in those trying times.

He laid aside the volume and the work of his life at the same time. On August 19th, 1883, he passed away. It is said that Brockie never looked as beautiful as it did on the evening of August 21st, when, about sunset, its master passed through its gates for the last time.

All the work of the latter part of his life was done under the disadvantage of the physical disability caused by the loss of the use of his right arm. In the summer of 1869 he went to the south to argue a case



in Galveston, but when near Louisville, freight cars, stationary on a siding, scraped the side of the car in which he was sitting, and his arm was so badly injured that although it was decided that amputation was unnecessary, the arm remained useless for the remainder of his life. He endured seven weeks of great suffering, and it was only his habits of extreme temperance that, in the judgment of his doctors, saved his life. He learned to write with his left hand, but required a servant in constant attendance on his person.

Of his life as husband, father, citizen, it is not necessary to speak further. His sons, his daughter, his grandchildren, wear his name as a badge of distinction, and a son and daughter have each given to the world an appreciation of his character and life, incidentally showing the most tender and beautiful of natures in the intense enjoyment of a perfect home life. Their pictures of his life on the farm and among his family and dependents is charming in its simplicity and heartiness.

As a lawyer he was simply what he was as a man. "Rascals hated him, Honest men gloried in him." Once decided that his cause was right, every weapon was sharpened for the combat and the strokes were not spared; if they cut hard it was in the interest of what he believed to be the right, and the harder he hit the better he believed it to be.

As a judge he showed the judicial temperament in a greater degree than many men of his ardent tem-

perament. He would not be tempted by what he thought was a good cause to stretch the law to cover what it did not cover. He said in *Sharpless vs. Philadelphia*:<sup>40</sup>

If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the Constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

He would not mend, lest he should mar, the law, though no man ever had a more vivid sense of how much it might be mended.

As a statesman he stands one of the finest of figures, at a time when foundations tottered and gave way. It may be that to him it was granted to save his nation from ultimate disruption; at least it was to him in a very great degree due that it was saved.

But that country for which Jeremiah Sullivan Black sacrificed more than life, to which he gave his devotion, his time, his splendid talents, had been at the time of his death for more than a decade, in the hands of a political organization more powerful than any heretofore known in our public life, which used the moral enthusiasm aroused in the North by the War for their own selfish ends. "The party of moral ideas," as it named itself, claimed to possess all the virtue, all the excellencies of mind and heart, of the country. The advertisement of every virtuous act of every man calling himself by the party

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<sup>40</sup> 21 *Pennsylvania Reports*, 147.

name, as reward for his political allegiance; and the exploitation of every evil act of every man not actually allied with it, as evil perforce of the absence of that allegiance was a part of a system. Ridicule—merciless to the point of death, and ready to pursue its victim beyond the grave—of every act and measure not approved by the party censors, created a false public sentiment, so upon his shoulders was showered the abuse and contempt of men who did not know or who would not comprehend, his attitude, and that of those who stood with him.

He had “finished the fight, he had kept the faith.” From that first hour when, in Chauncey Forward’s office he had felt the overpowering grandeur of his chosen profession fall upon shoulders not yet strong enough for their burden, through years of patient endurance, and silent struggle to be worthy of that burden and its privileges; in the years of judicial endeavor to hold that balance even, that neither law nor liberty be sacrificed; in the dark days when the nation seemed about to break apart; in the later days—to him yet darker—when the attacks upon the fundamental liberties and the Constitution were so frequent and so insidious; in the latest hours of all when political corruption and corporate greed had fastened their degrading hold upon the civic life, he had been a fighter. As most men fight for wealth, for position, and for life, he fought for honor and for justice and for civil liberty.

For him there was but one thought—the welfare

of his country. Had those who misjudged him in that time; those who have since carelessly recorded that judgment, been as unselfish, as devoted to the country, as were many of those whom they criticized, the burden had been greatly lessened, the task of saving the country something less, and the ultimate result might have been achieved without that final tale of death, desolation, and reconstruction, which have left such indelible scars upon the pages of our history.

Judge Black had the defects of his virtues. He was a good hater; there is bitterness in hatred, and he is often bitter. But there is a tonic in such bitterness which makes it good to take; it is the giver who suffers. The taint of that bitterness was often in his thought; it was not he who laughed when those keen shafts of his touched the quick in the debates in the Constitutional convention, and the reporter brackets "laughter" at the stroke. He had to hurt. But when he was leaving them he said that they had been better to him than he deserved. He remembered how he had had to hurt, and the remembrance hurt him.

If it is a fault to see but one side of the question after espousing that side, it may be that he had that fault. Before choosing his creed, political or religious, he read and studied and meditated, and then when he had chosen he held to that choice with an absolute devotion.

In politics he did not adhere to the faith of his

father, who was a Whig. From boyhood the tenets of Democracy attracted him; as he grew older he saw more reason for the faith that was in him. Jefferson and Jackson to him had no equal. In their faith he saw the healing of the nations. When the new sect arose that "knew not Joseph" the followers of that sect were to him but erring wanderers in the political wilderness, and when he saw the nation following in their footsteps he well-nigh despaired for the future of his country.

It was of Jackson he said these words; they may be applied to Judge Black himself:—

The people for whom he lived, the state to which he gave so earnest a love, the nation for which he endured calumny and misunderstanding, and to which he gave his deepest devotion, all have now no word save that of praise and admiration for him. The wise and the just unite to honor his name as one "hallowed by its associations with great and benevolent actions."<sup>41</sup>

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<sup>41</sup> In writing this essay the editor has been under special obligation to Mrs. Mary Black Clayton, whose *Reminiscences of the life of her father*, have been of great value, and to Mr. Henry C. Niles, whose very brilliant paper on Judge Black, has been often consulted.



**EDWARD GEORGE RYAN.**





EDWARD GEORGE RYAN

From a photograph taken when Judge Ryan was about fifty-five years of age.

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# EDWARD GEORGE RYAN.

1810-1880.

BY

JOHN BRADLEY WINSLOW,

*Chief-Justice of Wisconsin.*

ON the 17th day of June, 1874, Governor William R. Taylor appointed Edward George Ryan to the position of Chief-Justice of the Supreme Court of Wisconsin, in place of Luther S. Dixon, who had recently resigned. The appointment was quite favorably received by the press and the people of the State, although with considerable surprise. It was by no means the case of the appointment of an unknown or obscure person to high office; Mr. Ryan was very far from such a person. He had on numerous occasions taken a commanding part in matters of the gravest importance in the political and legal history of the State, and had demonstrated beyond cavil or doubt his great abilities as an advocate, an orator and a scholar; but it may fairly be said that there was a widespread doubt as to whether his abilities, great as they confessedly were, were of the character which would render him a great or successful judge. He was then sixty-four years of age, he had never held a judicial position of any

kind, his entire professional life had been spent at the bar, his temper was uncertain and at times violent, the great cases in which he had appeared were of the kind which arouse the deepest passions and party feelings, and it was justly feared that the great qualities which had given him prominence as an orator and advocate were not of the kind which would tend to promote success upon the bench. Thus the appointment was regarded by many as an experiment, and at the best a doubtful one.

However, the experiment was made, and Judge Ryan took his seat with the good will and good wishes of all; and for more than six years he presided in the highest tribunal of the State, during which time he dispelled the doubts which followed his appointment, added greatly to the standing and prestige of a court which had already stood high among the courts of the nation, and in his opinions left a monument to his memory more enduring than any brazen tablet or marble shaft. More than a quarter of a century has now passed since his death; the mists of passion and prejudice have passed away; the clamor of the political partisan has ceased; time has drawn the kindly mantle of forgiveness if not of forgetfulness, over all mere infirmities of disposition or temper, and the time has come when a just and appreciative estimate may well be made of the character and achievements of the man.

In July, 1880, being applied to for a sketch of his life for publication, he prepared and sent to his son

Hugh (now a prominent lawyer of Milwaukee), the following brief memoir:—

I was born at New Castle House, my father's residence near the village of Enfield, in the County of Meath, Ireland, Nov. 13, 1810. My father, Edward Ryan, was a younger son of the family of Ryan, of Ballina Kill. He had married Abby, eldest daughter of John Keogh of Mt. Jerome, the chairman of the famous Catholic Committee. At the time of my birth my father was a prosperous man, the owner of lands purchased in part with the fortune he received with my mother. Between the peace of 1815 and the passage of the corn laws he was ruined, as almost all others were who owed money on land. He then removed to Black Hall, in the County of Kildare, which he rented and where he lived till near his death, barely supporting his family. My mother's father was a very wealthy man, who died while I was a mere youngster. He left an annuity to my mother for the purpose of educating her children. There were ten of us, and we all received an excellent education. I received mine at Clongowes Wood College, where I remained for seven years from 1820 to 1827. I was always destined for the law, in the study of which I was nominally engaged in 1828 and 1829. But I was an expensive and improvident youth and a great burden to my father. I had exaggerated notions of the ease with which men get on in this country, and I finally obtained my father's consent to come here. So I came in 1830. I did not then know, but have long since known that my father expected me to fail and to return to Ireland. I was too proud to do so. I studied law in New York as I could, supporting myself by teaching. I was admitted in 1836 and came that year to Chicago. Up to that time I had never known what sickness was, but I was particularly subject to miasmatic diseases, and I was in very poor health during the whole time I remained in Chicago. In 1842 I was married to your mother, Mary, eldest daughter of Capt. Hugh Graham, and immediately moved to

Racine. I lost your mother in 1847, and as soon as I rallied from the blow prepared to move to Milwaukee, and moved there in December, 1848. In 1850 I married Caroline Willard, of Newburyport, Mass. The rest you know as well as I. Above you have the outlines of my life. You can fill them up for Mr. Reed, using no superlatives and making it a mere biography. I gave the same data to the late Col. Slaughter, who wrote an extravagant panegyric of which I was heartily ashamed. I have an instinctive aversion to putting my face (of which I am not proud), in a book, and I have a perfect horror of the distorted caricatures of wood cuts which they put in Wisconsin publications.

Here the autobiographical sketch ceases. None can accuse its author of egotism. He had reached the ripe age of three-score years and ten when he wrote these modest lines. While his life had been full of disappointments, and had resulted in failure from a financial point of view, it had also been tumultuous and stirring: he had played the leading part in many a serious drama which had moved the great heart of the young State to the utmost; great opportunities had come to him, and some of them he had seized, and scored brilliant intellectual triumphs; he had been abused, maligned, and condemned,—but his great abilities had never been questioned; his life had been one of storm and stress; like a day full of darkness and tempest, but made glorious by a great burst of golden light flooding the sky at eventide.

Such being the case, it seems that a few details may well be added to the meager outlines just quoted.



Mr. Ryan was of Roman Catholic parentage and baptism; during his entire residence in Wisconsin, however, he was a regular attendant upon the services of the Episcopal Church. Of his life in New York little is known further than he himself has told us. Doubtless it was a period of hard work and poverty. He received his second naturalization papers in that city, April 9th, 1836, and was admitted to the bar, May 13th following. He soon came to Chicago. His practice in that city was not so great as to occupy his entire time, but his active mind demanded occupation and he became, in 1839, the editor of a Democratic paper called the "Tribune," through whose columns, for about two years, he gave expression to his views upon the politics of the day in vigorous English and stately periods which must have spent their force far above the heads of the greater portion of the frontier community at which they were leveled. The paper died in 1841, probably from lack of financial support. March 4th, 1841, he was appointed State's Attorney for the Seventh Judicial Circuit of Illinois, by a commission signed by Thomas Carlin, Governor, and Lyman Trumbull, Secretary of State. He removed to Racine, Wisconsin, in 1842, and practiced there until 1848. While living in Racine he was elected a delegate to the First Constitutional Convention of the Territory, held in 1846, and took a prominent part in the debates of that body. After his removal to Milwaukee, in 1848, he was associated at different times as a partner with a number of

prominent lawyers, among whom were James G. Jenkins (afterwards United States Circuit Judge), and Ex-Senator Matthew H. Carpenter and he was engaged in many important causes, some of which were of state and even of national importance, which will be referred to later in this sketch. During the years from 1870 to 1873, inclusive, he was City Attorney of the City of Milwaukee, and in June, 1874, he was called by the Governor to be Chief-Justice of the highest court in the State. This appointment crowned a long and troubled life. Doubtless he knew his own abilities full well; doubtless also he realized to some extent his infirmities. When he was appointed he said, "This is the summit of my ambition; it is the place to which I have looked, but it has been so long delayed that I have ceased to expect it."

His physical appearance in his prime is thus described by a contemporary writer in the book called "Fathers of Wisconsin":—

In person Mr. Ryan is five feet, ten inches in height, weighs about one hundred and eighty pounds, neither of robust nor delicate frame, but muscular, sinewy and capable of much and long-continued labor. His movements are quick and his step elastic, his complexion is florid, his hair light, his eyes blue, large and expressive.

The writer can speak only from personal recollection of his appearance while he was a member of the Supreme Court. He was then quite bowed by age, and his walk was plainly infirm but the piercing

brilliancy of his eyes, which seemed almost starting from his head as he bent them upon a lawyer arguing a case, could never be forgotten. Under that gaze pettifogging seemed out of the question, and any attempt to lead the judicial mind astray was worse than useless.

His features were large and striking, rather than handsome; his face would attract attention at any time and in any company, even when at rest, but when illumined by the fire of intellectual combat the eyes blazed and the whole countenance seemed leonine in its strength.

Chief-Justice Cole, of Wisconsin, in his reply to the addresses of the bar after Judge Ryan's death, referred to him as having a "susceptible temper." This mild expression was characteristically moderate but entirely inadequate. From his very youth Mr. Ryan was afflicted with a very violent temper. It was unreasoning and unreasonable. The most trivial incidents aroused his anger, and when aroused it seemed that nothing could appease it. By these outbursts he drove clients from his door, and well-nigh wrecked his professional career. He made bitter enemies without necessity or reason and alienated those who would fain have been his friends. This failing was undoubtedly the curse of his whole life, the great weakness in a character which in other respects possessed most, if not all, of the elements of greatness.

Turning from the contemplation of this serious

infirmity of temperament, which was inborn rather than acquired, we shall find many characteristics upon which we may dwell with pleasure. His nature was always deeply religious. Whether there is any truth in the report which is given currency in one of the published sketches of his life, that his parents designed him for the priesthood, I know not; but it is certain that he came of a reverent and religious parentage, and that he carried the impress of those early influences to the very end of his life. During his residence in Milwaukee he was a constant attendant and communicant of St. John's Episcopal Church, and while he lived at Madison of Grace Church. That his thoughts were often directed toward religious subjects is shown by the character of several unpublished essays, or lectures, which he left among his papers. Often, especially in his later years, did he discuss the great problems of life and death, and always with the strong convictions of a Christian. Thus, Chief-Justice Cole, in his reply to the bar, before mentioned, relates the following incident:—

I well remember that on one occasion he put an end to our discussion on these intensely interesting subjects by uttering with great solemnity of manner substantially this language, "As for myself, I know that I possess a soul, an intellectual and moral part which is immortal. I believe that I shall have a conscious existence after death, that I shall meet beyond the grave friends and those I loved here, and I shall know them and they will know me. All this I as firmly believe as I believe that I shall see the sunlight to-morrow if I live."

Not only did he have a theoretical belief in the Christian religion, but he also made practical application of his belief by prayer. This I know, not only from the fact of his regular attendance at church services, but also from having found among the papers left by him a manuscript prayer for daily use, invoking divine guidance and help in the performance of his judicial duties. It was evidently prepared and used by him after he came to the bench, and its simple and reverent eloquence and pathos should insure it a place in any liturgy. Among the same papers I also found a manuscript form for daily family prayers, in his own handwriting, and rivaling in beauty and dignity the personal prayer first mentioned.

Again, he passionately loved justice and as passionately hated oppression and wrong. Akin to this characteristic also was his love of truth and his detestation of hypocrisy and time-serving. That which he believed he proclaimed to the world without thought or fear of its effect upon his popularity. Thus, though he was always a Democrat in politics, he became the leading counsel for Bashford in the celebrated case of *The Attorney-General ex rel. Bashford vs. Barstow*,<sup>1</sup> in 1856, when it seemed that the will of the people was in danger of being defeated by fraudulent election returns, and in the course of that litigation he triumphantly vindicated the principles of honest government, although the

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<sup>1</sup>4 Wisconsin Reports, 567.

result was to place a political opponent in the Governor's chair of the State. The famous so-called "Ryan address" of 1862 also demonstrates this feature of his character. This paper was a long address to the people of the State, adopted by the Democratic State Convention of that year and which had been prepared by a committee of which Mr. Ryan was chairman, and was unquestionably the product solely of his brain and pen. It was in no sense a disunion document, as was freely charged at the time; it denounced the rebellion of the Southern States as "unnecessary, unjustifiable and unholy," and demanded the most vigorous prosecution of the war; but at the same time it was an impassioned appeal for the maintenance of the Constitution of the United States against certain measures, such as the suspension of the writ of *habeas corpus*, which had been deemed necessary by the national administration, but which he deemed to be encroachments upon the guaranties of that instrument. He doubtless knew that, in the heated state of the public mind, such a protest would bring down upon him (as in fact it did) a storm of obloquy which would effectually bury any political ambition he might possess; but he did not hesitate to denounce publicly what he deemed to be encroachments upon the Constitution with all the vigor of his matchless rhetoric.

It goes without saying that such a man had a high code of professional and judicial ethics. The tributes of life-long acquaintances leave us not in doubt

as to those matters, but he has expressed himself so eloquently as to the scope of the duties of lawyers and judges, in his address to the Wisconsin University Law Class of 1873 that I cannot do better than to quote a few sentences. Of the lawyer, he says:

This is the true ambition of the lawyer; to obey God in the service of society, to fulfill His law in the order of society, to promote His order in the subordination of society to its own law adopted under His authority, to minister to His justice by the nearest approach to it under the municipal law which human intelligence and conscience can accomplish. To serve man by diligent study and true counsel of the municipal law; to aid in solving the questions and guiding the business of society according to law; to fulfill his allotted part in protecting society and its members against wrong, in enforcing all rights and redressing all wrongs; and to answer before God and man according to the scope of his office and duty for the true and just administration of the municipal law. There go to this ambition, high integrity of character and life, inherent love of truth and right, intense sense of obedience, of subordination to law because it is law, deep reverence of all authority human and divine, generous sympathy with man, and profound dependence on God. These we can all command. There should go high intelligence. That we cannot command, But every reasonable degree of intelligence can conquer adequate knowledge for meritorious service in the profession.

Of the judge he says, in the same address:

The bench symbolizes on earth the throne of divine justice. The judge sitting in judgment upon it is the representative of divine justice, and has the most direct subrogation on earth of any attribute of God. In other places in life the light of intelligence, purity of truth, love of right, firmness of integrity, sin-

gleness of purpose, candor of judgment, are relatively essential to high beauty of character. On the bench they are the absolute condition of duty, the condition which only can redeem judges from moral leprosy. The judge who palters with justice, who is swayed by fear, favor, affection or hope of reward, by personal influence or public opinion, prostitutes the attribute of God and sells the favor of his Maker as atrociously and blasphemously as Judas did; but the light of God's eternal truth and justice shines on the head of the just judge, and makes it visibly glorious.

It may be said with confidence that whatever Judge Ryan's failings were, it was never charged for a moment that he wilfully departed from these high ideals of professional and judicial conduct. His mind was clean, his thoughts pure, vice did not allure, loose living did not attract him. He loved truth as he loved law and justice, with a love that was almost worship. Deceit and falsehood stirred his indignation profoundly. He was careless of money, avarice and greed were foreign to his character; large fees had no temptation for him; the wealthy client whose cause seemed tainted with wrong, or whose conduct displeased him was turned from his door just as quickly as the client with the tainted cause who came in rags. He died poor; he had no faculty nor inclination for acquiring wealth. In this connection it is related of him that he once said in debate:

I never so much esteem my divine Master: I never feel such a nearness to the Nazarene as when I read that in his exalted and righteous anger he scourged the money-changers and drove them from the temple.



An incident which occurred while he was on the bench well illustrates his jealous regard for his own honor, as well as his emotional character. Just before going on the bench one morning, he received by mail a letter containing a one hundred dollar bank bill, with a request for a favorable decision in a case about to be argued. The letter came from an ignorant suitor, who had come to Madison to watch his case, and who probably had no idea of the heinous character of the act. Judge Ryan took the letter and bill to Judge Lyon, his colleague, who was sitting in the same room, and said in a voice trembling with emotion and with tears upon his cheeks, "Judge Lyon, what has there ever been in my life that would lead anyone to believe that I could be bribed?" So strong was his emotion that it took some time for Judge Lyon to soothe his highly wrought feelings. The man was at once prosecuted and punished for the offense.

Some further anecdotes may not be out of place, as side-lights upon his character. The following is related in the work called the "Bench and Bar of Wisconsin," edited by Mr. John R. Berryman. While in partnership with Senator Carpenter there was employed in the office a clerk who was more especially under Mr. Carpenter's direction, and against whom Mr. Ryan had taken a violent and unaccountable dislike which was so extreme that he could not abide his presence in the same room. At one time, while Mr. Carpenter was absent attending

court in Beloit, Wisconsin, this clerk came into Mr. Ryan's room in the morning and asked if he had any instructions to give him as to the office work. "Yes, sir, I have," said Ryan, and turning to his desk, hastily wrote a few lines, sealed the note, handed it to the clerk and directed him to take it to Mr. Carpenter as soon as possible. The clerk, impressed with the importance of the message, rushed to the station, just succeeded in catching a train, and on his arrival at Beloit made all speed in taking the note to Mr. Carpenter, who was engaged in the trial of a case. Hastily tearing open the note, Mr. Carpenter read as follows:

*Matt. H. Carpenter,*

DEAR SIR: I want you to keep your lackey out of my office.

Yours respectfully,

E. G. RYAN.

Tradition frequently prefixes a vigorous adjective to the word "lackey" in the note.

The following incident is related in an article published in the *Green Bag*. He was once arguing a case in the Supreme Court of the United States. Chief-Justice Chase was presiding, and during Ryan's argument the great Chief-Justice turned to an associate and began a whispered conversation. Perceiving this, Mr. Ryan paused and waited until the Chief-Justice turned as if to inquire the cause of his silence. Then Ryan said with great dignity but significant impressiveness, "What I am saying is worth hearing." It is said that the Chief-Justice

blushed deeply, and afterwards gave perfect attention.

As an instance of his powers of sarcasm it is related that, on being informed that a legal acquaintance had married a fortune and obtained a fine federal appointment, he exclaimed, "God bless him! The lucky, lazy dog! He never opened his mouth but to yawn, and never opened it but a sugar-plum fell into it."

Another anecdote, long current at Racine, runs as follows: When Honorable Experience Estabrook, of Lake Geneva, was Attorney-General of the State, in 1852 or 1853, Mr. Ryan was engaged in the argument of a case in the State Supreme Court, in which he was opposed to the Attorney-General, and in the course of his remarks referred to Mr. Estabrook as "this vagabond Attorney-General." The court was shocked at this breach of professional courtesy towards an officer of the court, and the presiding judge called Ryan to order, and informed him that he would be required to show cause when court convened in the afternoon why he should not be punished for contempt of court. Ryan came in at the appointed time with a dictionary, and showed the court that the word "vagabond" was an adjective as well as a noun; that used as an adjective it meant "strolling or wandering from place to place;" that he had used it as an adjective simply, and that so used it was inoffensive and strictly true, because the Attorney-General resided at Lake Geneva and

came to Madison only as duty called, and this might be truly said to stroll or wander from place to place. The justices conferred a moment and decided that the explanation was unsatisfactory, and a fine of fifty dollars and costs was imposed. As he paid the fine at the clerk's desk, he said in a reflective way, but loud enough to be distinctly heard, "I am compelled to pay this fine because the Supreme Court of Wisconsin doesn't know the difference between a noun and an adjective." Another version of the story is that after paying the fine he walked up and down the room and said *sotto voce*, "I have been fined fifty dollars for expressing my opinion of the Attorney-General of this court. Great Heavens! what would I have been fined if I had expressed my opinion of the court itself."

That Judge Ryan was a profound scholar there can be no question. As well might one doubt the resistless power of Niagara while standing on its brink, as to doubt the learning and scholarship of Ryan while reading one of the masterpieces of his massive brain. Whether the subject be religious, philosophical, or purely legal, the sweep of his eloquence is overwhelming. His English is pure and undefiled; every word expresses the exact shade of meaning desired. The sentences are short and intensely virile. He well understood the telling force of the short Anglo-Saxon word, the brief explosive sentence, the startling antithesis and the striking epigram, and he used them all with marvelous effect;

but he was also master of metaphor and simile, of the stately period and the classic allusion, and these also he called to his aid at will. They all flowed in a limpid and copious stream, apparently without stint and without effort, as though language were his plaything and eloquence his birthright. All knowledge seemed at his command; satire, philosophy and logic his willing handmaids. He transformed and illumined the most commonplace subject. Wit and humor he had in good degree, but it was apt to be trenchant and sarcastic, rather than rollicking. It was more often than otherwise used to drive home a telling shaft of ridicule, or tip a barb of satire. His command of invective was absolute, and he was not slow to use it; pitiless and scathing, it left its unhappy victim to writhe in helpless misery. His conclusions were always radical, and frequently extreme. This was the natural result, not only of his disposition and temperament, but largely also of the brilliancy of his literary style. He who makes frequent use of antithesis and epigram will doubtless make literature which will chain the attention and thrill the heart, but he will almost as surely be guilty of exaggeration and inaccuracy. The temptation is too great to be resisted; truth will be sacrificed to brilliancy of rhetoric; antithesis is ineffective if it be not startling; epigram falls flat if it be not extreme. They may dazzle the mind and lead astray the judgment for the moment, but calm reflection will frequently repudiate the conclusion thus reached.

But if we admit, as I think we must that this was the case with Judge Ryan, we must admit also that his writings, whether legal, philosophical, or religious, show him to have been possessed of a marvelous power of reasoning, a depth of learning rarely equaled, an ease and strength of composition which carries the reader spellbound upon its current, and that there runs through them all the great, strong note of genius. They claim our attention and admiration with an imperative and resistless demand which can come only from merit.

The question as to whence came these great and commanding qualities will naturally be asked. That he was endowed by nature with a commanding intellect can not be doubted, but that he developed and added to his great natural abilities by life-long study can as little be doubted. The college from which he graduated at the age of seventeen was a Jesuit institution which numbers among its alumni Reverend Francis Mahoney ("Father Prout") and General Thomas Francis Meagher, of Civil War fame. Presumably it was a small institution, giving that prominence to classical studies which was universal at that time. It can hardly be supposed that it furnished anything approaching what we now call a liberal education. But whatever its merits or defects, here it certainly was that the foundations of the splendid literary edifice which the great Chief-Justice left behind him were deeply and surely laid.

It is certain, however, that his education was only

begun in college; much as he may have there learned, it was but the prelude to a lifelong course of study. Books were his delight, and he read them not to pass the hour away, but to lay up their contents in the treasure-house of his brain, where they were always at his command. Contact with men and things, the fierce attrition of mind against mind in the battles of the forum, the work of preparation for those battles in the long hours of night, all these broadened, matured and developed him. He reached not the heights suddenly or without effort, but

He, while his companions slept,  
Was toiling upward in the night.

His ordinary conversation was a perpetual delight, and he delighted in it. Dictionaries surrounded him while at his work and were in constant use. He was content with no written sentence until it was perfect. Slovenly writing was an abomination to him. The proper word was the word to be used, and there was never more than one proper word.

While Judge Ryan's fame must always rest primarily upon his record as a lawyer and a judge, it should be noted that he left some remains in the line of general literature which, while existing only in manuscript, should of themselves insure him an honorable place among men of letters. These remains consist principally of a number of essays or lectures upon social and religious problems. One of these essays is entitled "Mrs. Jellyby," and is a discussion of the claims of woman to share the ballot with man;

another is entitled "Faith" and is an eloquent plea for greater faith, both in our fellowmen and in God; another is entitled "Heresy," and is an earnest argument for the absolute religious freedom of the individual soul; while an unfinished essay entitled "The Crucifixion" presents that event as the central fact of human history.

No time can properly be spent here in a consideration of these purely literary efforts. A single quotation from "Mrs. Jellyby" may serve to show their style. Of conservatism he says:

Pure conservatism is always wrong, civilization is never fixed. No Joshua has power to stay the course of the human mind. Change is the necessity of human history, progress the duty of the human race. Pure conservatism has no place in the annals of mankind. It concedes the past, but denies the future. It worships the actual, but anathematizes the possible. Its creed is the present because it is the present. It holds with Pope that whatever is, is right. It is a bigot of the present, without sympathy with the past, or prophecy of the future. Content where it finds itself, pure conservatism sits down by the wayside, while the march of civilization passes by and presses on to the promised land of the future, guided on its dark way by faith in the destiny of man as by a pillar of fire.

Eloquent and beautiful as the essays are, they were but diversions in a busy life. Judge Ryan was first of all a lawyer, not an essayist, and to his chosen profession he unreservedly devoted his genius, his labor and his love. His address to the graduating law class of the University of Wisconsin has already been mentioned. It is a legal and a literary classic.



There have been many such addresses, made by distinguished men, but there are few, if any, which so completely fill the ideal as this one. It takes a lofty view of the law and of the legal profession. It opens with the sentence, "Law in its highest sense is the will of God." This is the keynote, and from this he deduces the proposition that lawyers and judges who perform their duty faithfully are in a true sense the ministers of God's justice:

There it stands, the profession of the law; subrogated on earth for the angels who administer God's law in heaven; there it stands charged with the peaceful protection of every public right of the state, of every civil and religious right of the people of the state; charged with the security and order of society. In peace, the life, liberty and property of the country, its personal freedom and its political symmetry are in its ultimate keeping.

I think this address may well be called Judge Ryan's literary masterpiece. Its loftiness of thought is equaled only by the magnificence of its rhetoric. It abounds in brilliant epigram; satire sparkles on its pages like priceless jewels in a kingly crown. Witness the following characterization of the pettifogger:

Behold the pettifogger, the blackleg of the law. He is as his name imports, a stirrer up of small litigation, a wetnurse of trifling grievances and quarrels. He sometimes emerges from professional obscurity and is charged with business, which is disreputable only through his own tortuous devices. For the vermin cannot forego his instincts even among his betters. . . . Indeed he is the troglodyte of the law. He has great cunning, he mistakes it for intelligence. . . . He knows all things.

Nothing is new to him. Nothing surprises him. Nothing puzzles him. But it is in the law that his omniscience shows best. His talk is of law incessantly. He has a chronic flux of law among his followers. He prates law mercilessly to every one, except lawyers. He discourses of his practice and his success to the janitor of his office, and the charwoman who washes his windows. He revels in demonstrative absurdity, and boasts of all he never did. He is the guide, philosopher and friend of vicious ignorance. He is the oracle of dullness. . . . There is a variety of the animal, known by the classic name of shyster. He has forced the word into at least one dictionary and I may use it without offense. This is a still lower specimen; the pettifogger pettifogged upon; a troglodyte who penetrates still deeper darkness. . . . He thinks all lawyers are as he, but not so smart. He believes in the integrity of no man, in the virtue of no woman. He loves vice better than virtue. He enjoys darkness rather than light. His habits of life lead him to the back lanes and dark ways of the world. He is the counsel of guilt. He is the attorney-general of crime.

No young lawyer should consider himself ready to practice until he has read this address. No law library should be considered complete which does not contain it. In these days of commercialism in the law, it would be well if its lofty sentiments could be printed in letters of gold upon the door posts of every law school in the land.

As has before been said, Mr. Ryan was a delegate from Racine to the First Constitutional Convention, which assembled in Madison, in 1846. This may be said to have been his introduction to the people of the young State. Few knew him or appreciated his abilities when the convention opened, but none of

his colleagues doubted his great powers as a debater and a lawyer when it closed. He was chairman of the committee on banking, and took strong ground against banks of issue, as well as against the granting of banking powers to corporations; he also strongly opposed an elective judiciary, on the ground that the terms of office of judges should be permanent. The constitution proposed by the convention was rejected by the people, largely on account of its restrictions upon banks.

He was a delegate to the Democratic National Convention held in Baltimore in 1848, and removed to Milwaukee in December of that year. Here he soon attained that prominence as a lawyer which his abilities deserved, and his services were sought after in many important causes. Among these were a number of notable criminal cases, of which the Radcliffe murder case, in 1852, was perhaps the most celebrated. In this case he appeared for the prosecution, with Mr. A. R. R. Butler. Upon the defense there appeared Jonathan E. Arnold and A. D. Smith. It was a veritable battle of the giants, for the four men named were all in the very first rank of the Wisconsin bar. The trial lasted for more than two weeks, and attracted great crowds; so much so that when the evidence had been taken the court adjourned to a large public hall in order to accommodate the desire of the people to hear the great legal duel. It was perhaps the greatest opportunity that Ryan had then had to demonstrate his power, and he

did not fail to take advantage of it. A few sentences from his address to the jury will serve to give an idea of its lofty tone:

Life is the gift of God, yet one which any, however weak, may take away, but which not the united power of all men in all countries, and of all times can restore. . . . It is not that we crave for the defendant's blood that we stand here. We pity him; God knows that we pity him, and those that are connected with him. But we stand here for the blood of the living. It is not for the blood of Ross, but for the blood of everyone in this hall and in this community; it is for the blood of those yet unborn and of all who are to live after us; it is that murder may cease, that men may reflect, pause, turn cowards before they strike down their fellowmen; it is because the law of God and the law of man, and the safety and existence of society demand it, that we stand here and urge upon you the conviction of this defendant.

Notwithstanding a very strong array of circumstantial evidence (for none had seen the act), the defendant was acquitted. Judge Levi Hubbell, then circuit judge, and *ex-officio* a member of the Supreme Court, was on the bench, and so convinced was he of Radcliffe's guilt that when the verdict of acquittal was rendered he asked the foreman in surprise, "Is that your verdict?" "It is," said the foreman. "Then may God have mercy on your conscience," said the judge.

This incautious remark of Judge Hubbell cut deeply, and one of the jurymen, William K. Wilson, appeared before the legislature on the 26th of January, 1853, and demanded the impeachment of Judge

Hubbell, charging him with numerous acts of official misconduct upon the bench. Thus was initiated the first and (up to the present time), the last impeachment trial which the State of Wisconsin has witnessed. Here, too, Judge Ryan was the leading figure; here at last he stepped fully and fairly into the greatest forum of the State, where every eye was turned upon him, where party passions and personal hatreds were turned loose, and where not the future alone, but the distinguished past as well, of one of the State's most honored sons hung trembling in the balance.

Judge Hubbell was an ambitious and able man. He was elected judge of the second circuit, composed of the counties of Milwaukee, Waukesha, Jefferson, and Dane, in 1848. The Supreme Court was then composed of the circuit judges sitting together, and thus Judge Hubbell was also a member of the Supreme Court, and was by the choice of his associates, Chief-Justice of that court from 1850 until January, 1852. In 1853 the separate Supreme Court was organized, but he was never a member of that body. He was a Democrat in politics, and that party was then in control. He was courteous and dignified in manner, of great industry, and prompt in the despatch of business. Inspired by his sense of personal wrong, Wilson ran down every wandering rumor and presented to the Assembly a long array of charges and specifications covering almost every phase of judicial misconduct. The Assembly

resolved to report articles of impeachment, and appointed as managers of the prosecution Messrs. H. T. Sanders, G. W. Cate, J. Allen Barber, P. B. Simpson, and E. Wheeler. The managers employed Mr. Ryan to conduct the case, and upon him fell the brunt of the battle. His opening argument was made on June 13th, 1853, and the trial continued until July 11th of the same year. The testimony was voluminous, and the legal questions arising were many and intricate; but he met all the questions, whether of fact or law, with a quickness of mental discernment, a brilliancy of rhetoric, and a wealth of learning which amazed his friends as well as his enemies. Wit and satire sparkled in his speech, apt quotation and allusion added splendor to his diction, while ever and anon merciless invective gleamed like the fabled sword, Excalibur. He had need of all his talents, for opposed to him was Jonathan E. Arnold, his antagonist in the Radcliffe case, one of the ablest lawyers who ever graced the bar of the State. The result was an acquittal upon all of the charges. Upon most of the specifications the majority for acquittal was large, but upon one the vote stood 12 for conviction and 12 for acquittal.

It is impossible to give extended extracts from the many addresses made by Judge Ryan during the course of the trial, nor even any adequate résumé. It was reported in shorthand and fills a volume of more than eight hundred pages, copies of which are now quite rare. The criticism (and perhaps the

only criticism) to be made upon the conduct of the case is that the charges were pressed with a vehemence amounting almost to extravagance, and this fact must have gone far to create sympathy for the accused. A single extract from his peroration will perhaps serve to demonstrate all that has been said as to the strength of his diction as well as to the scathing power of his invective:

It is the habit in many of the States to place a statue of Justice upon their courthouses and capitols. It is well, Mr. President, that no such statue adorns the dome of this capitol, before the judgment in this cause shall have settled the standard of public justice in this State. If by your judgment this defendant is to be the model of judicial integrity, his conduct your standard of judicial purity, let the statue of Justice be ordered for your capitol. But be true to your standard. Follow no false precedents. It is the habit to represent Justice as a pure, young and beautiful maiden, chastely and modestly robed, with her eyes blindfolded, with her virgin hand holding out the pure scales of Justice suspended and poised in the open light of day before the world. That has been the sculptor's dream of Justice, sanctioned by the nations of the earth. But with a new standard follow no old precedents. Ask your sculptor for no pure blinded virgin as your ideal of justice. Tell him to erect upon the dome of this capitol the marble image of a jaded, decayed, broken, unclean, diseased wanton, blinking from behind the distorted bandage put upon her eyes to dupe the scruples of mankind, and reaching forth the hand which has dropped the sword of Justice, to put the weight of avarice and lust and every unclean passion into the scales to bear down truth and right.

Two cases of great state, and even national, importance rapidly followed the impeachment trial, the

first being the Booth Case in 1854, where the question was raised whether the fugitive slave law of the United States was constitutional, as well as the question whether a State court could discharge on *habeas corpus* a person under prosecution in the courts of the United States for violation of the law. This case created great excitement through the whole State. Byron Paine appeared for Booth, and took the extreme state-rights position to the effect that a state court could not only declare a law of the United States unconstitutional, and release a prisoner of the United States on that ground, but that its judgment could not be reviewed by any court. Mr. Ryan appeared for the United States, and controverted with his accustomed ability this dangerous doctrine. Mr. Paine's view was presented with an ability which Judge Ryan himself later admitted most gracefully, and the court coincided with it, and even went so far as to refuse to transmit the record of the Supreme Court of the United States in response to a writ of error.<sup>2</sup> Both the legislature and the people indorsed the action of the court, and thus, strangely enough, Wisconsin stood in line with South Carolina upon the question of state rights. The Supreme Court of the United States, however, reversed the decision, and by reason of this reversal, and the result of the Civil War which soon followed, the doctrine has been relegated to the lumber room of the past, and Judge Ryan's position fully vindicated.<sup>3</sup>

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<sup>2</sup> *In re Booth*, 3 Wisconsin Reports, 1.

<sup>3</sup> *United States vs. Booth*, 21 Howard's Reports, 506.



The second case was that of *Bashford vs. Barstow*,<sup>4</sup> which was brought in the Supreme Court early in 1856, and involved the office of Governor of the State, it being claimed that Barstow's apparent election by a small plurality was based upon false and manufactured returns from remote districts. Here Judge Ryan appeared for Bashford, the Republican contestant, and triumphantly vindicated the cause of honest and fair elections. Bashford was shown to have been elected, and was seated by the court. Mr. Ryan was criticized by some of his party friends for appearing on behalf of Bashford, and is said to have replied:

I am a Democrat. I was almost born a Democrat. My appearance here on the part of a Shanghai client has led to some remarks. I am not aware that I have any general retainer from the Democratic party. If to keep with my party all principle must be sacrificed; if I cannot be true to honesty, true to truth, without losing caste with my party,—then the party may go.

In addition to the cases of state and national importance which have been mentioned, Judge Ryan had his share of important private litigation, in which his talents were utilized to the full. It is time, however, that attention should be paid to his judicial labors, for these were doubtless the crowning glory of his life, and by these, as is the case with most lawyers who become Judges, he will be best known to posterity.

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<sup>4</sup>4 Wisconsin Reports, 567. "Shanghai" was at that time used in the West as a nick-name for a member of the Republican party.

Judge Ryan came to the bench in June, 1874. By Chapter 273 of the Laws of 1874, commonly known as the "Potter Law," the Legislature of the State had undertaken to establish maximum rates for the carriage of passengers and freight by railroads in the state, and to forbid the exaction of any higher rates. The law had been ignored by the railway companies, on the ground that their charters formed inviolable contracts with the State which could not be impaired by any act of the legislature; in other words, that the legislature had no power to fix rates. Early in July, 1874, the Attorney-General of the State, Honorable A. Scott Sloan, filed informations in the Supreme Court and moved for writs of injunction against the Chicago & Northwestern, and the Chicago, Milwaukee & St. Paul railway companies to restrain them from violating the law by charging greater rates for the carriage of passengers and freight than were permitted by the act. The cases were of vast importance to the railway companies, and they well appreciated the fact. Numerous able counsel appeared for the companies, and the two motions were argued together in August, the arguments occupying a week. The main question in the cases was, of course, the question of the power of the legislature to affect the original charters of the companies at all, but in addition to this there were a number of difficult questions concerning the practice adopted, and the original jurisdiction of the Supreme Court under the Constitution, which were argued with

great ability and were now presented for the first time.

The motions were decided September 15th, 1874, in an opinion written by Judge Ryan and filling eighty-five pages in the official reports.<sup>5</sup> It was his first opinion, and probably his greatest. Certainly, had he written no other, this alone would have amply demonstrated his learning and ability, and given him high rank as a jurist. All the questions raised are treated in a style which betrays not only the master hand of the learned lawyer, but the law was fully sustained. The opinion was read at length from the bench by the Chief-Justice, a proceeding which was unusual in the court and consumed nearly or quite the entire day. It left no substantial question undecided, and in fact terminated the entire litigation. The railroad companies recognized the futility of further litigation, and at once proceeded to obey the law.

It would be impossible to give any adequate idea of the opinion by isolated extracts. It must be read to be appreciated. But it may be proper to quote briefly from that part of the opinion touching upon the remedy by injunction, which seems especially interesting in view of the discussion raised in recent years concerning what is called "government by injunction." After noting the marvelous growth in wealth and power, of modern corporations, he said:

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<sup>5</sup> The Attorney-General vs. Railroad Companies, 35 Wisconsin Reports, 425.

It would have been a mockery of justice to have left corporations counting their capital by millions, their lines of railroad by hundreds, and even sometimes by thousands of miles, their servants by multitudes, their customers by the active members of society, subject only to the common law liabilities and remedies which were adequate protection against turnpike and bridge and ferry companies in one view of their relations to the public; and in another view to the same liabilities and remedies which were found sufficient for common carriers who carried passengers by a daily line of stages and goods by a weekly wagon, or both by a few coasting or inland craft, with capital and influence often less than those of a prosperous village shopkeeper. The common law remedies, sufficient against these were, in a great degree, impotent against the great railway companies, always too powerful for private right, often too powerful for their own good. It was in these circumstances that the English courts of equity applied their restraining jurisdiction at public or private suit, and laid on these great companies the strong hand of equitable control. And all England had occasion to bless the courage and integrity of her great judges who used so ably and so freely and so beneficially the equity writ, and held great corporations to strict regard to public and private right. Every person suffering or about to suffer their oppression by a disregard of corporate duty may have his injunction. When their oppression becomes public, it is the duty of the attorney-general to apply for the writ on behalf of the public.

The case of *Drake vs. Doyle*, arising in 1876, was perhaps quite as important as the railroad cases. It involved the question of the power of the state to impose conditions upon foreign corporations desiring to transact business in this state, and seemed to involve also a direct conflict with a decision previously made by the Supreme Court of the United

States. It arose in this wise. By Chapter 56 of the Laws of 1870 the legislature of Wisconsin had provided that a foreign insurance company might be licensed to do business in this state upon filing with the Secretary of State certain documents, among which was an agreement not to remove any actions brought against it to the United States courts. The Home Insurance Company, of New York, had filed the agreement and received its license, and then when suit was brought against it in the state court, had petitioned that court to remove the case to the United States court, under the act of Congress providing for such removal. The court denied the petition, tried the case, and rendered judgment for the plaintiff and the Supreme Court of Wisconsin, on appeal, affirmed the judgment in an opinion by Chief-Justice Dixon, on the ground that it was perfectly competent for the insurance company to waive its right of removal, and that the courts would enforce its agreement to that effect.<sup>6</sup> This case went to the Supreme Court of the United States, and the judgment was reversed by a divided court, the majority holding that the statute was an obstruction to the right of a citizen of another state to remove a case to the United States courts, guaranteed by the federal Constitution, and hence void; and that the agreement made in pursuance of an unconstitutional statute was also void.<sup>7</sup>

<sup>6</sup> *Morse vs. The Home Insurance Company*, 30 Wisconsin Reports, 496.

<sup>7</sup> *Insurance Company vs. Morse*, 20 Wallace's Reports, 445.

In 1872, by Chapter 64 of the laws of that year, the legislature of Wisconsin passed another act, providing that if any foreign insurance company made a petition to remove an action pending against it to the United States court, its license to do business in this state should be immediately revoked by the Secretary of State. Action having been brought in the state court against the Continental Insurance Company, of New York, it made its petition for removal to the United States court, and the case was removed. Thereupon a private citizen applied to the Supreme Court of Wisconsin for a writ of mandamus compelling the Secretary of State to revoke the license of the company for this violation of its agreement.

At first blush it would seem that the case of Insurance Company against Morse was decisive on the question, but the court held, in a very learned and persuasive opinion by the Chief-Justice, that the case was not decided by the Morse case, and that the State, having power to exclude entirely foreign corporations, had necessarily power to license them to enter the state upon condition of their forbearing to exercise a right, and revoke that license upon their attempting to exercise it.<sup>8</sup> The importance of the case, and the gravity of the situation was fully recognized, but there was no attempt to gloss over or evade the points involved. The opinion was an unanswerable argument, based upon decisions rendered by the Supreme Court of the United States itself.

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<sup>8</sup> State *ex rel.* Drake vs. Doyle, 40 Wisconsin Reports, 175.

The case was at once taken to the Supreme Court of the United States by writ of error. The Insurance Company had in the meantime brought action in the Circuit Court of the United States and obtained a judgment enjoining the Secretary of State from revoking the license, and an appeal from this judgment was pending at the same time. The result was that the Supreme Court of the United States, while announcing that the Morse case was not overruled, in effect receded from the position taken in that case and held the law valid, thus practically affirming the judgment of the Supreme Court of Wisconsin.<sup>9</sup> The result was not only a victory for the state, vindicating its right of effective control over foreign corporations, but also a rare tribute by the greatest judicial tribunal of the nation, to the reasoning powers of Chief-Justice Ryan.

Great constitutional cases are, however, not very frequent even in the courts of last resort. The great mass of litigation concerns merely private rights, and requires the application of very ordinary legal principles; it gives neither opportunity nor excuse for bursts of eloquence. The desideratum in such cases is a clear and accurate statement of legal principles, and a logical demonstration of their application to the case in hand, rather than a display of rhetoric. Yet, even in such cases it must be admitted that fitting language and faultless diction add materially

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<sup>9</sup> Doyle vs. Continental Insurance Co., 94 United States Reports, 535.

to the strength and convincing character of the opinion.

A few extracts will show that Judge Ryan was not lacking in this regard. Thus, in the Craker case,<sup>10</sup> commonly known as the "Kissing case," where a young lady passenger on an accommodation train was kissed by the conductor against her will, and sued the railway company for damages, the following very conclusive argument occurs in the opinion of the Chief-Justice. After noting the argument made by the railway company that it might have been liable had the young lady not been protected by the conductor from assault by a third person, but was not liable when its own employee made the assault, he said:

It is contended . . . as we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while the wolf makes way with a sheep the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*. The radical difficulty in the argument is that it limits the contract. The carrier's contract is to protect the passenger against all the world. The appellant's construction is that it was to protect the passenger against all the world except the conductor whom it appointed to protect her, reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity.

In *Wight vs. Rindskopf*,<sup>11</sup> where the question was whether services rendered by a lawyer in endeavor-

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<sup>10</sup> *Craker vs. Chicago & North Western Railway Co.*, 36 Wisconsin Reports, 657.

<sup>11</sup> 43 Wisconsin Reports, 344.



ing to influence a public prosecutor so that the client might escape with a minimum punishment could be recovered for as legal services, it was held that such a contract was against public policy and sound morals, and could not be the basis of a contract to pay for them. In the opinion he said:

The profession of the law is not one of indirection, circumvention, or intrigue. It is the function of the profession to promote, not to obstruct the administration of justice. In litigation the lawyer becomes the *alter ego* of his client; and professional retainer rests in absolute and sacred confidence. But the duty imposed by professional retainer is direct and open. Professional function is exercised in the sight of the world. Professional learning and skill are the only true professional strength. Forensic ability is the only true professional influence on the course of justice. Private preparation goes to this only as sharpening the sword goes to battle. Professional weapons are welded only in open contest. No weapon is professional which strikes in the dark. The work of the profession is essentially open because it is essentially moral. No retainer in wrong is professional. A lawyer may devote himself professionally to the legitimate business of his client, but he cannot be retained in whatever may not be rightfully and lawfully done. He may defend a wrong done in the past, but he cannot be privy to the doing of a wrong in the present. The profession is not sinless, but its sins are all unprofessional. When a member of the bar is privy to the wrong-doing of his client, he is his client's accomplice, not his lawyer.

Sometimes (though rarely), a play of wit lightens the opinion, as in the case of *Vassau vs. Thompson*,<sup>12</sup> where a man was sued because his dog worried a cow

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<sup>12</sup> 46 Wisconsin Reports, 345.

to death. In a dissenting opinion in this case he said:

The subject of the complaint is a dog and a cow, hereditary enemies since the days of the House that Jack Built. But in this case it was the dog that killed the cow. . . . It would be a violent and irrational presumption that either human or brute servant, trained to a particular vice by a master whom he loves and reverences would never indulge in the vice for his own gratification, without orders. Habit becomes a second nature, and this dog presumably acquired a personal taste for ox-tail.

When the conduct of client or counsel called for rebuke, he was apt to administer it in scathing language, yet he could be gentle, as the following instance demonstrates. An eminent lawyer of Milwaukee, when defeated in an important case, made a motion for rehearing, and opened his brief with the following sentence:

The series of misfortunes which I have latterly met with at the hands of this court, has shaken my confidence in the result of any effort I may make to convince the court or to obtain its favorable judgment in any case where a serious contest is possible.

After quoting this sentence, the Chief-Justice said:

The fact may be as stated, though the late volumes of reports do not quite appear to verify it. But the suggestion is not fair either towards the learned counsel himself, or toward the court. For it may be an imputation of failure in the intelligent discharge of duty equally to either. It does not seem to have occurred to the learned counsel that the misfortune of which he complains may be attributable to his clients, or to the work which they give him to do. A great judge once said that great lawyers

were frequently unsuccessful for the reason that being generally expensive luxuries, they are apt to be employed only in desperate cases. This may be the occasion of the learned counsel's complaint, and his consolation.

Extracts from his opinions might be multiplied almost indefinitely to show how he illumined every legal question which he discussed, however insignificant it might be, but time and space forbid. Singularly enough, his opinions may be searched almost if not quite in vain for any examples of the vehement language or extravagant statement which were so frequent with him as an advocate, and this notwithstanding the fact that his health was shattered by disease. Either his elevation to the supreme bench had sobered him, or his exalted ideas of the proper functions of a judge had made him more careful and considerate.

Chief-Justice Cole has borne testimony to the fact that in the consultation room he was uniformly courteous to his associates, always the calm, dignified judge, freely exchanging views and discussing all questions of law and fact with the manifest desire of reaching the right result. The truth of this statement seems to be borne out by the character of his opinions.

The influence of such a man and such a career upon the bench, the bar, and the jurisprudence of Wisconsin, was necessarily great. It is impossible to measure such an influence accurately, but some conclusions may be very confidently stated. His pro-

found reverence for the law as the earthly exponent of divine justice, and his lofty ideal of the true function of the lawyer and the judge as the ministers of that justice, could not fail to leave a deep and lasting impression upon the bench and bar of his adopted state. There is much talk of the disappearance of the old-time lawyer, with his lofty views of his chosen profession, and it is doubtless true that a spirit of commercialism has invaded the profession which threatens, unless properly directed, to lower the standards of professional ethics. The lawyer is and must be far more of a business man than formerly. Modern conditions make the change inevitable. He may, however, retain his high ideals, notwithstanding the change in his lines of work, and it is believed that the bar of Wisconsin as a whole has retained and does still retain in a marked degree its devotion to a high code of business and professional ethics. That bar is now composed very largely of graduates from the law school of the State University. Probably very few of those graduates have finished their course without reading the address made by Judge Ryan to the Class of 1873, and the effect of that address in stimulating the mind of the young lawyer to a high conception of his duty in the profession can hardly be overestimated. To this must be added the influence resulting from frequent eloquent periods upon the same subject, contained in his arguments at the bar and his opinions upon the bench. It is not too much to say that Wisconsin owes much to Judge

Ryan's influence in this direction, and had his life left no other effect, this alone would have made it well worth the living and worth recording.

Judge Ryan did not come to the bench during the formative period of the jurisprudence of the young state. Nearly forty volumes of reports, territorial and state, had been published before his first opinion appeared. His distinguished predecessors, Chief-Justices Whiton and Dixon with their colleagues, had already most ably and satisfactorily grappled with and settled the great mass of those questions of substantive law governing public and private rights which must arise in every new commonwealth, and had given form and direction to the jurisprudence of the state. There were great questions still arising, however, notably the question of the power of the state to control its own creations, the great corporations, and the question how far that power was lodged within the constitutional grant of original jurisdiction to the Supreme Court. Both of these questions were sharply presented in the Railroad Cases before mentioned, and here the court was first called upon to define the limits of the power as well as the limits of the court's original jurisdiction. It was fortunate for the court and the state that Judge Ryan was on the bench at this juncture. Not that a different result would have been reached had the bench been differently constituted, but that it was important that questions so vital should be luminously treated, and the results stated not only in a manner befitting their

gravity, but with such a broad and comprehensive grasp that the cases should serve to blaze the way definitely and certainly for future litigation upon kindred questions. All this was accomplished by Judge Ryan's opinion in these cases, which has formed a veritable treasure house for the bar and the court in the investigation of like questions arising during the years which have passed since that time.

Again, it may with truth be said that Judge Ryan's work upon the bench contributed materially to stability of decision. He strongly believed in following long-established rules of law, not from any slavish regard for mere precedent, but upon the broad principle that it was more important to the bar and to the public that the law should be fixed and certain, than that some particular case should be decided in such a manner as to satisfy the real or supposed equities of the case. Few, if any, of his opinions can ever be cited as among those where "hard cases have made bad law." It is believed that Judge Ryan aided very greatly in placing and keeping the Supreme Court of Wisconsin in its position as a court where stability of decision is to be confidently expected.

On the 13th of October, 1880, he left the bench when a case was called in which one of the parties had been his client. The next day he sent word to his colleagues that he was ill, and on the 19th of October he died. He had wished to die "with his harness on," and Heaven granted his desire. There was no dreary waiting for release, no slow decay of

mind and brain; his wonderful intellectual powers were unimpaired, the matchless eloquence of tongue and pen were still his in all their perfection; but the body was weary, disease had racked it sorely, and storms of passion had enfeebled it; the mysterious veil which separates us from the other world was drawn aside for a moment, and the great but storm-tossed spirit of Edward George Ryan passed into the presence chamber of the Creator.





**GEORGE SHARSWOOD.**



GEORGE SHARSWOOD

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# GEORGE SHARSWOOD.

1810-1883.

BY

SAMUEL DICKSON,

*Chancellor of the Law Association of Philadelphia.*

GEORGE SHARSWOOD, a justice of the Supreme Court of Pennsylvania for fifteen years, during four of which he held the position of chief-justice, was born, of English descent, in the city of Philadelphia, upon January 10th, 1810. He entered the college department of the University of Pennsylvania as a sophomore, in the class of 1828, and was graduated at its head, delivering the Latin Salutory on Commencement Day.

From two addresses delivered by him in 1856 and 1859, before the Alumni Society, may be gathered some notion of his habits and subjects of study during his college life. He speaks with warm appreciation of his fellow students and of "the venerable and beloved men who formed at the time the Faculty of Arts." He maintains the superiority of the old fashioned system of instruction, for the reason that its object was not so much to communicate knowledge as "to teach young men how to study and to excite them to love to study." In both addresses, as in his

advice to law students, he puts the greatest stress upon the necessity of thoroughness. A favorite quotation was, *multum sed non multa*. In speaking of Professor Thomson as one "who most carefully insisted upon an accurate knowledge of the grammatical structure of the languages, while, at the same time, he did not neglect in his prelections to lead the mind of the student to a discernment and relish of the beauties of the chaste models of poetry, history and eloquence, which, in turn, became the text books of his recitation-room," he added:

Beyond question it is in the slow, patient and constant exercise of the power of discrimination in analysis — in the consequent improvement of the most important of the mental faculties, the judgment — and in the formation of habits of concentrated and steady attention, that classical studies are most useful to the youthful intellect. While the memory is not over-burdened, every lesson tends to the gradual development of the intellectual strength. . . . The maxim, *multum sed non multa*, applies with peculiar force; and such was the leading feature in Professor Thomson's course. The recitation was short, but he exacted a perfect knowledge of it in every student. Pages could not express a higher eulogium upon him as a teacher of the true old stamp.

In his later address, he protested against the attempt to teach too much and too many subjects.

In the race to accomplish great things, we seem to have forgotten the good old motto, *Festina lente* — the unquestionable axiom that accurate knowledge of the first elements, well engrafted in the mind by frequent repetition, goes much farther in making a thorough scholar than lessons, recitations and lectures, intended to put the pupil in possession of everything that



ever was or is known. Voluble talkers may be thus manufactured, but not scholars or students. They may fancy that they are *savans*, but the world soon discovers them to be superficial *sciolists*. They forget all they were taught in less time that it took them to acquire it, and have failed to obtain what is the most important of all, a love of knowledge and the art of learning as things ought to be learned. . . . Read only few books, but understand them thoroughly. Let them be the standard works — the master pieces. Study but few subjects, but conquer such as you do study. . . . Accurate knowledge is that which is truly power. It has certainty, and therefore force. It gives assurance and confidence to the possessor. It makes him a close, logical thinker; he sees clearly his way, and his course is simple, direct and onward.

These views were copiously illustrated, and he closed by saying:

Thus I have endeavored, very imperfectly, I am aware, to illustrate and enforce a very old opinion, but still true, that there is no royal road to learning — that hurrying, and crowding, and cramming are injurious, if not fatal to the vigor of mind as well as of the body.

His exactness of knowledge in mature life, made it apparent that he had well improved his college days, and acquired habits of resolute and persistent application, which well qualified him to enter upon the study of law. He was registered as a student at law in the office of Joseph Reed Ingersoll, of whom he used to speak in after life as "my honored master." Mr. Ingersoll was the son of Jared Ingersoll, who had been for five years a student in the Middle Temple, and was named for President Joseph Reed, who

was also a student in the same place from 1763 to 1765,—it being quite usual, at that time, for Philadelphians to add at least two years of study in the Inns of Court to the regular period of instruction at home.

While pursuing their studies, they had every advantage which London could offer. Their fellow students were the future leaders at the English Bar and in public life, and many of the young Americans were welcomed in the best English society. When they came back, after such training and experience, they brought with them a range of learning and knowledge of books, a familiarity with the traditions of the bench and bar, and an acquaintance with the standards of learning and manner of debate prevailing in the English Courts and Houses of Parliament, which helped to form an ideal to which they felt themselves bound to conform and which they transmitted to their successors. The preëminence of the bar constituted by and of these men is a part of the professional history of the country. From the first, it was adorned by lawyers who were in no respect provincial, and it was because he regarded the bar of Philadelphia the strongest at that time in the country, that Chief-Justice Ellsworth advised Charles Chauncey to move to Philadelphia. Mr. William Rawle, who had himself been a student in the Temple, gave it as his deliberate judgment, that “at the Philadelphia Bar were men whom we would not have feared to oppose to an equal number from the

excellent Bar of Westminster Hall," and Mr. Binney was of opinion that "one and all of them would have been recognized as able men in Westminster Hall, and more than one of them would have stood at the height of that Bar, and their superiors have not, I think, shown themselves in any part of our land." It is of three of the members of that bar that we have most authentic and lifelike portraits in the sketch written by Horace Binney, entitled "The Leaders of the Old Bar," now accessible to the profession in the volume published by the Law Association of Philadelphia, as a memorial of its Centennial Celebration which occurred in March, 1902. One of the three was Jared Ingersoll, who had been Mr. Binney's own preceptor, and who was in the opinion of Judge Sharswood, "the most distinguished leader of the Philadelphia Bar in its palmyest days." He was the father and preceptor of Joseph Reed Ingersoll, and under such surroundings and influences, Mr. Ingersoll had been prepared for the bar, where he soon won a prominent position of his own, and after having served several terms in Congress, accepted a position as Minister to the Court of St. James. While in active practice, he received many students in his office, and among them Mr. Sharswood.

As a rule, the lawyers in active practice of that day had their offices in their dwellings, and devoted most of their evenings to professional work. Students were expected to give at least five evenings of the week to study, and it was usual for the preceptor to

direct their reading, to test their progress by frequent and systematic examinations, and to supervise their drafts of pleadings, conveyances and other legal instruments. This was the training which Lord Eldon thought invaluable, if not indispensable, and he ascribed his knowledge of equity pleadings to having copied everything he could lay his hands upon,<sup>1</sup> just as Judge Curtis ascribed his skill as a common law pleader to his having been in the habit of reciting Chitty's forms while walking the floor with a sick child in his arms.<sup>2</sup>

The close and constant intercourse in the office also resulted in many instances in intimate friendships, and students at that time grew up under social influences of the most wholesome and elevating character.

In a sketch of Mr. Ingersoll, written for the American Philosophical Society, Judge Sharswood thus described him as a preceptor:

It is a very high testimonial to the estimation in which Mr. Ingersoll was held as a lawyer and a man, that so many young men were placed under his direction by their own choice or that of their parents or guardians, to be trained for the bar. I have a list taken from his diary, commencing in 1826, of forty-five names: some eight or ten preceded that period. His course toward them was marked by great fidelity as well as kindness. He not only prescribed their course of reading, and examined them at short stated intervals as to their progress, and understanding of the subject—but took care by employing them in the preparation of pleadings and other legal papers—in making searches in the

<sup>1</sup> Twiss, *Life of Eldon*, vol. I, 98.

<sup>2</sup> *Life of B. R. Curtis*, vol. I, 61.

offices, and occasionally attending before magistrates and arbitrators, that they should be initiated in the practice of their profession. He was always ready to resolve their doubts, or to explain what they could not understand in the course of their studies. He followed them after their admission to the bar, with advice and encouragement, associating them with him in the trial of causes, and manifesting in every way a deep interest in their success. Many of them have done honor to his instructions by eminence in their profession, and have concurred in cherishing and expressing on all suitable occasions, their confidence, respect and affection for him. To me it is a source of pride and gratification, that having been one of his students, and honored as I believe with his friendship and regard after leaving his office, I am permitted the privilege, on an occasion like this, to record my sense of the obligation under which he placed me, and to testify my reverence and gratitude. *An quicquam nobis tali sit munere majus?*

Of Mr. Ingersoll's students, Judge Sharswood was the most distinguished. He was admitted to the bar on December 15th, 1831; but fortunately he was able to continue his studies for some years longer before becoming immersed in ordinary work. It is only a part of the course of study which he himself pursued, that he afterwards outlined in the appendix to his Professional Ethics, and reproduced in a note to Blackstone's introductory chapters on the Study of Law in General. In his Professional Ethics, page 128, he quotes as worthy of most serious consideration, some remarks of Horace Binney, in his sketch of William Tilghman, as follows:

There are two very different methods of acquiring a knowledge of the laws of England, and by each of them, men have succeeded

in public estimation to an almost equal extent. One of them, which may be called the old way, is a methodical study of the general system of law, and its grounds and reasons, beginning with the fundamental law of estates and tenures, and pursuing the derivative branches in logical succession, and the collateral subjects in due order; by which the student acquires a knowledge of the principles that rule in all departments of the science, and learns to feel as much as to know what is in harmony with the system and what is not. The other is, to get an outline of the system, by the aid of commentaries, and to fill it up by the desultory reading of treatises and reports, according to the bent of the student, without much shape of certainty in the knowledge so acquired, until it is given by investigation in the course of practice. A good deal of law may be put together by a facile and flexible man, in the second of these modes, and the public are often satisfied; but the profession itself knows the first, by its fruits, to be the most effectual way of making a great lawyer.

Adopting this view of the proper method of preparation, he insists upon the reading again and again of Blackstone and Kent, and after adding a list of elementary works which should be well conned, he proceeds to prescribe certain order of subjects under eight heads or branches, and then gives a list of books to be read under these heads, including twenty-five works on real estate and equity, nine works on practice, pleading and evidence, nine on crimes and forfeitures, eleven on natural and international law, and the cases on this subject in the Supreme Court of the United States, ten works on constitutional law with the cases in the United States Supreme Court reports, nine works on the civil law, eighteen works on persons and personal property, and four works

on executors and administrators. He concludes by saying:<sup>3</sup>

I believe that the course which I have thus sketched if steadily and laboriously pursued, will make a very thorough lawyer. There is certainly nothing in the plan beyond the reach of any young man, with ordinary industry and application, in a period of from five to seven years, with a considerable allowance for the interruption of business and relaxation. One thing is certain,—there is no royal road to Law, any more than there is to Geometry. The fruits of study cannot be gathered without its toil. It seems the order of Providence that there should be nothing really valuable in the world not gained by labor, pain, care or anxiety. In the law, a young man must be the architect of his own character, as well as of his own fortune.

While following the course of study recommended to others, he went through a systematic course of reading upon economic questions and in the classics, and acquired a sufficient knowledge of French and Spanish to read those languages with facility. Before becoming occupied as an active practitioner, he began as an annotator, and in 1834, an American edition of Roscoe on Criminal Law appeared, under his supervision as editor, which subsequently ran through seven editions.

He was three times elected to the State Legislature, and once to the Select Council of the City of Philadelphia. In 1841, he wrote the Report of a Committee appointed by the stockholders to examine the affairs of the Bank of the United States, which is copied at length in Benton's *Thirty Years' View*.

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<sup>3</sup> Page 208.

It required a great deal of courage for a representative from Philadelphia to write such a paper at that time, and it was remarkable that one so young and with so little previous knowledge of practical affairs, should have been able to deal so effectively with the facts and figures of that stupendous insolvency.

He always regarded the knowledge of men and affairs which he had acquired as a legislator as of the greatest value to him in his services as a judge.

American editions of Leigh's *Nisi Prius*; Stephen's *Nisi Prius* and of Russell on Crimes, with notes contributed by him, appeared between 1838 and 1844. Of the latter, nine editions were issued. His annotations were clear, apposite and adequate, but concise, and he had become so well known to the Profession that his appointment in April, 1845, as Associate Judge of the District Court of Philadelphia, was universally approved and confirmed by the unanimous vote of the Senate. When he took his seat, he was but thirty-five years of age, and thereafter he continued a member of that Court until his election to the Supreme Court in 1867. Upon the resignation of the President Judge in 1848, he was appointed his successor. Under the amendments to the State Constitution, all judges of the Courts of Pennsylvania were made elective, but while opposing candidates were nominated against others, he received the nomination of all political parties and was unanimously elected. His new term began in



January, 1852, and in October, 1861, during the excitement of the Civil War, he was again unanimously reëlected to a second term of ten years.

During most of his years of service in the District Court, Judges Stroud and Hare were his colleagues. Judge Stroud, some years his senior, was a sound lawyer, with an exceptional memory, which enabled him to recall the name, volume and page of every important case in the Pennsylvania Reports. Judge Hare's unusual learning in every department of jurisprudence is well known to the profession through his editions of *Leading Cases* and *Commentaries upon the Law of Contract and Constitutional Law*.

It is no disparagement to his work as a member of the Supreme Court, to say that it was when presiding over a jury trial that Judge Sharswood's powers were displayed to the best advantage. In a letter to Mr. Webster, written a month after he had been engaged on the business of the Circuit Court, Judge Curtis wrote:

It has seemed to me that a far more difficult and useful field of labor, speaking generally, is the safe, prompt, judicious and wise controlling power of a Judge of the Circuit. I have no doubt that every quality and attainment of which a Judge is capable, may there find their fullest exercise and their most difficult work. I presume you will agree with me, that there is no field for a lawyer, which, for breadth and compass and the requisition made on all the faculties, can compare with a trial by jury; and I believe it is as true of a judge as of a lawyer, that in their actual application of the law to the business of men, mingled as it is with all

passions, and motives and diversities of mind, temper, and condition, in the course of a trial by jury, what is most excellent in him comes out, and finds its fitting work, and whatever faults and weaknesses he has are sensibly felt.

In this estimate of the qualities required for the successful conduct of jury trials, every lawyer of practical experience will concur, and it may be said deliberately, with a full apprehension of the force of the words used,—that never was there any English speaking judge the superior of Judge Sharswood at *Nisi Prius*.

The business of his Court was large and varied, embracing every phase of civil business, and he showed himself competent to deal with any question brought before him.

His grasp of the facts in a case was unusually rapid and distinct, his knowledge sure and exact, and his power of statement unequalled in its clearness and impartiality. He enforced the rules of evidence himself without waiting for objections; leading questions were checked, nothing was allowed in rebuttal that should have been offered in chief, and every question which arose upon the trial was ruled, and ruled squarely, without argument. His attention never flagged, and his own notes of testimony were a complete record of every case, and in his charges the facts were presented so fully, the evidence was marshaled so fairly, and the law applied with such clearness of exposition, that it was often said that no counsel ever fully understood his own

case till he had heard Judge Sharswood's charge to the jury, and the losing party went away satisfied that full justice had been done.<sup>4</sup> In the calling of the motion and argument lists his dispatch of business was even more striking. He seemed to detect at a glance the real point of a case, and to have at instant command the law which bore upon it. At the same time, if counsel had anything pertinent to urge he was a patient listener, and being absolutely free from pride of opinion, if convinced he was wrong, he would acknowledge his mistake without hesitation. In short, every one in the court room was made to feel that the sole purpose in view was to get at the truth, and that he, as the ablest and wisest of them all, was guiding and directing the whole proceeding to reach that end and that only. It never occurred, therefore, to any one to suggest that he was above bias, partiality, or influence, for no question of the kind ever occurred to any one in his presence. It was apparent that his mind was so constituted that it would have been impossible for him, if he had tried, to entertain an improper motive in the discharge of official service.

When he was appointed President Judge after three years' experience as Associate-Judge, he found over sixteen hundred cases on the trial list, and in a speech delivered at a dinner given on his retirement from the Supreme Court, he told how he had determined, with the concurrence of his associates, to

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<sup>4</sup> *Etiam quos contra statuit, aequos placatosque dimisit.*

make an attempt to break it down, and how, with the hearty coöperation of the bar, it had been accomplished. In six or seven years, the list was reduced to about six hundred, and remained there, though the suits on the appearance docket ran up from two thousand a year to six or eight thousand. He recognized that in driving trials so fast, injustice must have been done to suitors in many cases, but he added :

It was pretty hard work for three men, but with the hearty co-operation of the Bar, it was accomplished; in six or seven years the list was reduced to about six hundred and there it remained, though the business of the court had largely increased — suits on the appearance docket alone having run up from two thousand a year to six and eight thousand. I have sometimes been haunted with the fear that, in riding this hobby so hard — driving trials so fast — injustice must have been done to suitors in many cases. It was, however, a choice between two evils, for it is with the administration of justice as with everything else, there is nothing perfect under the sun. It is, indeed, a most difficult problem with any court to reconcile that speed as practically amounts to a denial of justice, with the care, study and deliberation required to arrive at the proper determination of important questions.

To dispose of the arrears of the court it was necessary to enforce the rule that a trial should be finished on the day it began, though it lasted until midnight, and this in a court which sat for ten months in a year.

At the Bar Meeting held upon the announcement of Judge Sharswood's death, Mr. Richard C. Mc-Mutrie, in speaking of his labors in the District Court said:

As to his administration in that court, it was, without exception, the most extravagantly laborious that I ever saw, and equal to the worst that I ever heard of, for labor that was put upon the bench. When he reached that court, he found the court in such a condition that under no circumstances could a case ever be heard for a year after it was brought. With the assistance of his Brother Stroud, who was as willing to work as he was, he introduced a system which was unquestionably a hard thing upon the Bar, but still harder upon the Judge — that a case begun on any day was to be finished on that day, last to what hour it might. On one occasion he remarked to me, “Never had I such a painful task to perform as yesterday. I began a case at ten in the morning, and at ten in the evening, Mr. Mallory, an aged man, who had been working with ten or fifteen minutes intermission, was so exhausted that he implored a delay to the next day; but I felt myself bound to refuse.” He was the one man, I may say, of all the men I ever knew, that considered himself as much bound by the rules which he had the liberty of breaking at his own discretion, with nobody to find fault with him, as if he could be compelled to obey them.

During his twenty-two years of service in the District Court, he delivered written opinions in over four thousand cases, of which 156 were carried to the Supreme Court, and of these, 124 were affirmed. These opinions were many of them brief, but to a large extent, they shaped the practice of the courts throughout the state, and were constantly cited in other courts, including the Supreme Court itself, as a final authority. They were for the most part, of the nature of the oral judgments pronounced in the English Courts, rather than of the legal essays with which we are now familiar. One of his dissenting opinions, however, calls for special notice.

In the case of *Borie vs. Trott*,<sup>5</sup> the District Court was required to pass upon the constitutionality of the Legal Tender Act of 1862. The judgment of the Court was in favor of the validity of the law, but Judge Sharswood read a dissenting opinion. It was only fifteen pages in length, but within that brief compass, he presented one of the most cogent arguments to be found in the books, against the existence of the power of Congress to issue paper money, and to make it a legal tender for the payment of debts. As this opinion is to be found only in local periodicals and Reports, it is thought that a full abstract should be given, both as a valuable contribution to the subject, and as an illustration of Judge Sharswood's simple and direct manner of dealing with such subjects.

Starting with the postulates that the Constitution of the United States is a special grant or delegation of limited powers to the Federal Government, and that to sustain the constitutionality of an Act of Congress, authority for it must be affirmatively shown, he disclaimed any intention to revert to political and controverted grounds, and announced that he meant to take exclusively as his guide, the principles judicially settled by the Supreme Court of the United States in the leading case of *McCulloch vs. The State of Maryland*,<sup>6</sup>—namely—that “If the end be legitimate and within the scope of the Constitution, all

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<sup>5</sup> 5 Philadelphia Reports, 366.

<sup>6</sup> 4 Wheaton's Reports, 316.

the means which are appropriate, and which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect." To this he added the further limitation upon the discretion of Congress in the choice of necessary and proper means, as stated in that opinion, that a great substantive and independent power cannot be implied as incidental to other powers, or used as a means of executing them; or, in other words, that no one enumerated power can be incidental to another enumerated power.

He then proceeded to the construction of the grants of power which were supposed to give Congress the authority to issue United States notes, and to make them a legal tender in payment of all debts public or private. These were:

To regulate commerce;

To borrow money on the credit of the United States;

To coin money and regulate the value thereof; and of foreign coin, and to fix the standard of weight and measure.

As to the first, he pointed out that there was an express clause granting and defining the authority to create standards of value, and hence, Congress could not make another kind as incidental to the regulation of commerce.

As to the second, he argued that the power could not be found under the authority to borrow money, and to issue acknowledgments of debt in a negotiable form, and incidentally, make them a legal tender, because such acknowledgments would be securities

which *ex vi termini* were something different from money, whereby the "United States notes," to be issued under the Act, would be, in fact, bills of credit—things distinct and different from securities.

For this position, he cited *Craig vs. State of Missouri*,<sup>7</sup> and *Briscoe vs. Bank of Kentucky*;<sup>8</sup> and quoted a sentence from Chief-Justice Marshall:

To emit bills of credit conveys to the mind the idea of issuing *paper intended to circulate through the community for its ordinary purpose as money*, which paper is redeemable at a future day.

He concluded, therefore, that Congress could not, as incidental to the power to borrow, create any kind of money which will not stand the test of the express power which is granted on that subject.

For confirmation of this view, he referred to the proceedings of the Federal and State Conventions, finding his justification for so doing in the precedent set by Chief-Justice Marshall in *Craig vs. State of Missouri*, where in discussing the nature of a bill of credit, he had said:

The language of the Constitution itself, *and the mischief to be prevented, which we know from the history of our country*, equally limit the interpretation of the term.

Judge Sharswood called attention, therefore, to the proceedings of the Federal Convention, when the plan of the Constitution had been reported, with a clause authorizing Congress "to borrow money and emit bills on the credit of the United States," and

<sup>7</sup> 4 Peters' Reports, 410.

<sup>8</sup> 8 Peters' Reports, 118.



upon motion of Mr. Gouveneur Morris, the words "and emit bills" had been struck out. He quoted also, the language of James Wilson—afterwards one of the justices of the Supreme Court of the United States and recently much misquoted as to the power of the Federal Government—to the effect that it would have a most salutary influence upon the credit of the United States "to remove *the possibility of paper money*," and of Luther Martin, to the Maryland Legislature, in which he complained that "not only were the States prohibited from emitting bills of credit without the consent of Congress, but the Convention was so smitten *with the paper money dread*, they insisted that the prohibition should be absolute."

He added to his citations, the declaration of Mr. Read, of Delaware, that such a power would stamp the Constitution "with the mark of the Beast in Revelations," and of Mr. Langdon, of New Hampshire, who declared "that he would rather reject the whole plan than retain the three words 'and emit bills.'"

On the other hand, he asserted that "in the discussions and objections which followed on the promulgation of the plan, before proceeding to vote on it in the State Conventions, as well as in the debates of those bodies, so far as they have been preserved and handed down to us, though every hole and corner of the instrument was ransacked to find objections, I am not aware that it was ever suggested that it might possibly contain so odious and unpopular a power."

He next took up the remaining clause "To coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures."

These words, in his judgment, sanctioned only coins or metallic currency. He found it taken for granted in the *Federalist*, and in Judge Story's *Commentaries*, and quoted the language of the Supreme Court, in the *United States vs. Marigold*,<sup>9</sup> in which the Court referred to "the trust and duty of creating and maintaining a *uniform and pure metallic standard of value* throughout the Union." Adverting to the promise of the notes to pay *dollars*, he asked the question—"What is a dollar?"—The true answer he found suggested in the words of Sir Robert Peel, that—"A pound is a definite quantity of gold, with a mark upon it to determine its weight and fineness,"—and so he contended that a standard of value must be of some actual value, and a dollar was a silver dollar of a specific weight and fineness.

He invoked also the authority of Mr. Webster, who had declared in his speech on the *Specie Circular*:

Gold and silver at rates fixed by Congress, constitute the legal standard of value in this country, and that neither Congress nor any State has authority to establish any other standard or to displace this. Most unquestionably there is and there can be no legal tender in this country under the authority of this Government, or any other, but gold and silver. This is a constitutional principle, perfectly plain and of the very highest importance.

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<sup>9</sup> 9 Howard's Reports, 560.

Judge Sharswood added:

I must confess, that upon a question of this magnitude—amid the conflict of opinion by which I am surrounded—my mind has rested with confidence and satisfaction upon this clear and decided conclusion of a great intellect.

He then answered the suggestions that Congress had the power of debasing coin, and that there was no difference between that and issuing paper money, depreciated below the value of coin, by pointing out, first,—that the debasing of coin would be an open, gross and palpable breach of faith, scarcely possible in the present age of the world; and second, the important difference between debasing of the coin and issuing paper money, that when an Act is passed debasing coin, all the mischief is done, whereas with paper money, it fluctuates from day to day, “there is no standard of value whatever.” He concluded with these emphatic words:

This was just what the men of the Revolution who met in the Federal Convention, who assembled in the State Conventions and ratified the constitution, had not merely heard with their ears, but seen with their own eyes, touched and handled with their hands, and felt in their own pockets. They had not the advantage of reading the same history repeated in a more rapid and aggravated form in the paper money of Revolutionary France. But they needed it not. They had quite enough in their own experience to make them determine to deal an effectual death-blow at paper money.

Of this argument, upon the latter point, Judge Hare, in his *Commentaries on American Constitu-*

tion and Law, says: "It was admirably stated by Judge Sharswood in *Borie vs. Trott*, and subsequent writers on the same side have done little more than put it in other words."

Notwithstanding the exacting requirements of his work in the District Court, Judge Sharswood accepted in 1850, the professorship of law in the Law School of the University of Pennsylvania, and the attendance upon his lectures was so encouraging that two others were added to the faculty in 1852, and thus the present school, which is now one of the most important in the country, may be justly said to have been founded by him, for, though originally opened by James Wilson, of the United States Supreme Court under favorable auspices, it was closed upon his retirement and, with the exception of a few lectures delivered in 1817 by Charles Willing Hare, never reopened until the election of Judge Sharswood.

His lectures were largely devoted to the peculiarities of the Law of Pennsylvania, and, with the exception of a small volume, made up for the most part of Introductory Lectures, and another entitled "Professional Ethics," were never published. The latter has gone through numerous editions and has recently (1907) received the remarkable distinction of being reprinted by the American Bar Association. It is a work of absorbing interest to the general reader as well as to the lawyer, and should be studied by every law student.

In a speech at a dinner tendered by the Philadelphia Bar after his final retirement from the bench, he expressed his pleasure at seeing many of his former pupils during the eighteen years that he was a professor in the Law Department of the University of Pennsylvania, and said:

That he should always recollect the years of his association with them as among the happiest of his life, and that he had watched the successful and honorable career of most of them with almost as much personal pride and pleasure as if they had been his own sons.

This feeling was reciprocated by his students, who looked up to him with filial regard and affection, and his memory is cherished by the members of a Law Club of the University of Pennsylvania bearing his name, at whose annual banquets an address has always been delivered commemorative of his virtues and services.

The immediate object of his lectures was to supplement the text books which the students of that day were expected to read. They were chiefly devoted to tracing the development of the law of the State in the decisions, and his written lectures were accompanied by informal talks upon topics suggested in the course of the examinations which were held from time to time. Furnishing a comment upon the current decisions of the day, the lectures and conversational discussions proved attractive to many already admitted to practice, and were largely attended by members of the Bar, as well as by students. He con-

tinued to serve as a professor until 1868, when he resigned upon his election to the Supreme Court.

In 1852 he published his first edition of "Byles on Bills" and the preface and notes of one of the later editions were incorporated by Mr. Justice Byles, in the 8th edition of his work, with a generous recognition of their value.

In 1853 he assumed the editorship of the English Common Law Reports, and added brief notes from the 66th to the 90th volume. His edition of Blackstone's Commentaries, which has since gone through many editions, was first published in 1859.

His preëminent fitness to be a member of the court of last resort, had been for years generally recognized throughout the state, but it was not until 1867 that he was nominated and elected an Associate-Judge of the Supreme Court. Though the opposing candidate was a judge of high reputation, the unanimous support of the Philadelphia Bar was sufficient to overcome the large majority for the other candidates of the Republican Party.

In reply to a speech of congratulation by Mr. Daniel Paul Brown upon the occasion of his leaving the District Court, in which Mr. Brown had said that he had been the candidate of both political parties, and that there was not a single member of the Philadelphia Bar but what had stood by him, Judge Sharswood said:

I came upon this bench comparatively a very young man and with very little experience. Practically, I had much to learn,

and much to unlearn. In the trial of causes there is always mental excitement, to which in my case there has often been super-added the irritation arising from bodily suffering. I feel conscious I have often made large drafts on your forbearance, but I have always found you willing to meet me. And now, looking over this large bar, allow me to declare that there is not a single member of it to whom I cannot with the most perfect sincerity hold out the right hand of fellowship and brotherhood.

When he took his seat, in 1867, on the Supreme Bench, the lists contained over 600 cases, of which 375 were disposed of, while the business of the court was rapidly increasing. To cope with the accumulating arrears, an hour's list was introduced in 1876, and was rigidly enforced, but the lists continued to increase until in 1879, when he became Chief-Justice, the number reached 1339, of which 860 were nominally argued. It is obvious that no important case could be fully discussed when only half an hour was given to each side, for in many cases, the opening counsel could hardly state the points and facts before his thirty minutes had expired. The system continued, however, with growing arrearages until 1895, when an intermediate court of appeals was created.

Unsatisfactory as was the curtailing of the time of argument to counsel, who were denied the opportunity of presenting their cases fully, it was not less so to the Court, since it became necessary to deal with the greatly increased number of cases with the aid only, for the most part, of printed briefs. Judge Sharswood's habit of concentrated attention and swiftness of perception enabled him to seize at once

upon the controlling points of the record, and with his vast and varied learning, and trained judgment, he reached the right result; but his opinions were less elaborate and instructive than they, doubtless, would have been, if there had been more time for their preparation. As a rule, they were brief and direct, giving the conclusion of the court, without much discussion of general or collateral matters; and absolutely free from thought of display; no citation or allusion being made except for the pertinent illustration of the matter in hand. Thus, in his opinion in *Borie vs. Trott*, it was only incidentally, and because illustrative of the views for which he was contending, that he made use of his knowledge of the political history of the country, and of his familiar acquaintance with economic questions.

In *Palairret's Appeal*,<sup>10</sup> when the power of the legislature to authorize the compulsory extinguishment by the owner of the land, of a ground rent, under the right of eminent domain, was under consideration, he alluded to "a favorite theory with many political economists, that small farms are injurious to the community, prevent the full development of the agricultural resources of a country, and ought therefore, as speedily as possible, to be united and formed into large ones." It was only, however, as a *reductio ad absurdum*, and he added a reference to the Vineyard of Naboth.

His opinions will be found, therefore, devoid of

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<sup>10</sup> 67 Pennsylvania Reports, 479, 488.



ornament, and free from any superfluous exhibition of learning or rhetoric. Simple, straightforward and business like, they exhibit the mastery of one familiar with his subject, who was mainly concerned to state, with clearness, the conclusions of the Court, without always tracing the steps by which such conclusions had been reached.

His long acquaintance with questions of practice, is exhibited in *Commonwealth vs. Vandyke*,<sup>11</sup> in a discussion upon the right of the sheriff to indemnity, and of the question whether the insufficiency of the indemnity offered, would be a defense to an action for a false return.

The liability of trustees, conveyancers and directors for less than supine negligence, was considered in *Neff's Appeal*;<sup>12</sup> *Watson vs. Muirhead*,<sup>13</sup> and *Spering's Appeal*.<sup>14</sup> In the latter case, he discusses the point, "by no means well settled," of what is the precise relation which directors sustain to stockholders, and having referred to the leading English and American cases, concludes "That they ought not to be judged by the same strict standard as the agent or trustee of a private estate;—that they were not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly

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<sup>11</sup> 57 *Pennsylvania Reports*, 34

<sup>12</sup> 57 *Pennsylvania Reports*, 91.

<sup>13</sup> 57 *Pennsylvania Reports*, 161.

<sup>14</sup> 71 *Pennsylvania Reports*, 11.

within the scope of the powers and discretion confided to the managing body.”

The case of *Commonwealth vs. Pittsburg & Connellsville Railroad Co.*,<sup>15</sup> was a *quo warranto* to forfeit the charter of the Railroad Company. The State of Maryland was interested in the defence of the charter, and Messrs. John H. B. Latrobe and Reverdy Johnson, with Mr. George Shiras, Jr., afterwards of the Supreme Court, appeared for the State of Maryland; James E. Gowen and Attorney-General Brewster for the State of Pennsylvania.

It was claimed that the Company had forfeited its charter under the laws of Pennsylvania, by procuring a charter from the Commonwealth of Maryland, and that such an act was inconsistent with the allegiance due to the sovereign who created it—that it was *crimen læsæ majestatis*—a species of treason.

The question was one of interest, but it was disposed of by Judge Sharswood in a single page. He points out that the corporation could not transfer its allegiance and thereby throw off its obligations under its original charter, and therefore, the act could, in no way, harm the Commonwealth of Maryland.

The tenant forfeits his estate who attorns to a stranger; because he thereby disclaims holding under his landlord, the very subject of the grant. It is the doctrine which gave the lord a right to resume it when the tenant denied his title; but a tenant might

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<sup>15</sup> 58 Pennsylvania Reports, 26.

have as many different landlords as he had acres of land, and owe fealty and service to each in respect to the subjects of grant.

Another alleged ground of forfeiture was the institution of proceedings in the Circuit Court of the United States, but, while conceding that it might be safely admitted that a corporation which undertook to drag its sovereign before the power of the tribunals of another sovereign, violated its duty, the Circuit Court of the United States was not the court of another sovereign.

The Federal Constitution is the constitution of this state, having been ratified and adopted by the sovereign act of the people in Convention, December 12th, 1787. They made it irrevocably their own by their entering into a solemn compact with the peoples of their sister states — binding them for all time — unalterable in any other mode than that pointed out by its own terms.

The last question was as to constitutionality of the Act of the legislature revoking the charter under a reserved power to repeal. The Act was declared unconstitutional upon the ground that the property of the Company could not be taken without compensation, and that the Act which provided that as full compensation for all damages and injury done, they should receive payment for expenditure made upon the lines of the said railroad, and the Governor should appoint three appraisers to value the expenditures so made, which, when appraised, should be paid to the defendant by any corporation thereafter authorized to construct a line of railway upon the original route, did not furnish a sufficient remedy. The

rule of valuation and appraisement was inadequate and unjust, and that the defendant should be turned over for the damages even thus inadequate, to an action against some company thereafter to be incorporated, was an illusory remedy and necessarily accompanied with unreasonable delay.

Several opinions upon the law of partnership are noteworthy. In *Slemmer's Appeal*,<sup>16</sup> the facts entitled the complainant to a dissolution and there was nothing in the articles of partnership to take the case out of the rule established by Lord Eldon, that each partner was entitled to a sale of the property, but the fact that a valuable business had grown up by the general labors and contributions of all, and that to appoint a receiver and direct a sale of the whole and the winding up of the business, would destroy this value, without benefiting either party. A decree was entered directing that the estate and assets of the partnership should be assigned and transferred to the partner who should offer to pay or secure to be paid, within a reasonable time, the highest price for the same.

The status of real estate owned by a partnership, is fully discussed in *Lefevre's Appeal*,<sup>17</sup> and in *Foster's Appeal*,<sup>18</sup> where it was ruled that where land is partnership stock, it never becomes personalty, even during the continuance of the firm, so as to give one

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<sup>16</sup> 58 Pennsylvania Reports, 168.

<sup>17</sup> 69 Pennsylvania Reports, 122.

<sup>18</sup> 74 Pennsylvania Reports, 391.

partner power to dispose of the firm's interest in it.

The distinction which Lord Eldon himself spoke of as "extremely thin," was adopted in *Edwards vs. Tracy*,<sup>19</sup> where it was decided that a commission "equal to" a share of the profits did not make the recipient liable as a partner. Judge Sharswood had previously held at *Nisi Prius*, in *Lord vs. Proctor*,<sup>20</sup> that a loan of money at a rate to be made "equal to" one-fourth of the profits did not constitute the lender a partner, and he there discussed with more freedom, the distinction which Mr. Justice Story called "satisfactory," though Lord Eldon did not think it so.

A question recently under discussion in Congress, was considered in *Commonwealth vs. Green*,<sup>21</sup> where it was decided that the legislature could not abolish any of the courts mentioned in the Constitution of the State, nor divest them of their entire jurisdiction, but could transfer some of their jurisdiction to other courts from time to time established. It may be added that Chief-Justice Thompson delivered a dissenting opinion.

The liability of an irregular endorser of commercial paper, which had long been under debate in Pennsylvania, was very fully considered in *Schafer vs. Bank*,<sup>22</sup> The right to set off unliquidated damages arising *ex contractu* under the Pennsylvania Act

<sup>19</sup> 62 Pennsylvania Reports, 374.

<sup>20</sup> 7 Philadelphia Reports, 630.

<sup>21</sup> 58 Pennsylvania Reports, 226.

<sup>22</sup> 59 Pennsylvania Reports, 144.

relating to set-off, was affirmed in *Hunt vs. Gilmore*.<sup>23</sup>

His opinions upon the construction of wills, all showed a thorough mastery of that branch of the law. A leading case in Pennsylvania, is that of *Horwitz vs. Norris*,<sup>24</sup> which arose under the will of Joseph Parker Norris, by which he had undertaken to devise two large bodies of real estate in the outskirts of the city, known as the Fair Hill and Sepviva estates. Judge Sharswood concurred in the decree, but not in the reasons given, and urged in support of his view:

It renders the testator's whole scheme of disposition consistent, equal and just, and saves him from sinning in his grave, which any man in my estimation does, who makes an unequal distribution of his property among his children or grandchildren, without some good reason for it. Upon the construction as now placed by the Court upon this will, it will follow that among the descendants of Mr. Norris — all with an equal share of his blood in their veins — most of whom he had never seen, and never could expect to see — without even distinguishing between those who should or those who should not bear his honored name — expressing as to his sons from whose loins they were to spring no preference of one over another — he is yet made arbitrarily and capriciously to include some and exclude others.

The Supreme Court was recently called upon again to consider the construction of this will, and adopted the view of the majority but without adding

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<sup>23</sup> 59 Pennsylvania Reports, 450.

<sup>24</sup> 60 Pennsylvania Reports, 261.

much, if anything, to the reason assigned by Judge Agnew.

His general views as to the construction of wills, are expressed in *McCullough vs. Fenton*;<sup>25</sup> *Provenchere's Appeal*,<sup>26</sup> and *Geyer vs. Wentzel*.<sup>27</sup> In the latter case, the will had been written in German, so that he began his opinion as follows:

Besides that the will of Henry Geyer is an instrument inartificially drawn, we have to labor to reach its meaning through the medium of a translation, which, as is well remarked by Cervantes, is like the wrong side of tapestry, where though we can distinguish the figures, they are confused and obscured by ends and threads.

An interesting question arose in *Van Dyke's Appeal*,<sup>28</sup> where the testator had given legacies to his daughters which absorbed the bulk of his real estate in Pennsylvania, and by the same will, gave his real estate in New Jersey to his sons. It was not so executed, however, as to pass real estate in New Jersey, and upon a bill filed, the daughters were put to an election—the English rulings being criticized and disregarded.

A case between the tenants in common of the Cornwall Ore-banks, under the name of *Coleman's Appeal*,<sup>29</sup> has become a leading one, settling the measure of damages at the value of the ore in place or

<sup>25</sup> 65 Pennsylvania Reports, 418.

<sup>26</sup> 67 Pennsylvania Reports, 463.

<sup>27</sup> 68 Pennsylvania Reports, 84.

<sup>28</sup> 60 Pennsylvania Reports, 481.

<sup>29</sup> 62 Pennsylvania Reports, 252.

ore-leave, as the just basis of account. It was also ruled that the agreement between the parties that the ore-banks should remain undivided, established a permanent tenancy in common, and partition could not be had without violating the covenant which ran with the land; and that as a tenant in common had under his title, no means of obtaining his share, other than by taking, at the same time, the shares of his fellows, he was at liberty to mine, accounting to his co-tenants at the value of the ore in place.

The true function of a preliminary injunction was considered in the leading case of *Audenried vs. Philadelphia and Reading Railroad Co.*,<sup>30</sup> and the right to issue a mandatory order upon an interlocutory application was denied. Commenting upon Lord Eldon's remarks in *Lane vs. Newdigate*,<sup>31</sup> Judge Sharswood said:

That is acknowledging that he could not, according to the principles and practice of the court, order the defendant in direct terms to restore the stop-gate and repair the works, the injunction should be so drawn that, although on its face restrictive only, it will, in order to comply with it, compel him to do these very things. This is not a precedent which ought to be followed in this or any other court. A tribunal that finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection. Injunction as a measure of mere temporary restraint is a mighty power to be wielded by one man. It would extend far beyond all safe and reasonable bounds to permit it to go farther.

In *Kane vs. Commonwealth*,<sup>32</sup> he maintained that

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<sup>30</sup> 68 Pennsylvania Reports, 377.

<sup>31</sup> 10 Vesey Junior's Reports, 193.

<sup>32</sup> 89 Pennsylvania Reports, 522.



in criminal cases, the jurors were judges of the law as well as of the facts, a view which has since been rejected by the Supreme Court of the United States.

Without multiplying citations, a perusal of the cases referred to, will more than suffice to give the reader an understanding of Judge Sharswood's strong common sense, sound and mature learning, practical wisdom and high sense of justice. Always impersonal, single-minded and direct, there is no hint or suggestion from first to last that it had ever occurred to him to make any exhibition of his learning, or his skill or power in debate, or that any thought of self had ever intruded upon the consideration or treatment of the question in hand.

The habit of his mind was conservative. Upon constitutional questions, he held to the rule of strict construction, and was not willing to go a hair's breadth beyond the limits marked off by the Supreme Court in the days of Marshall. He was a believer in the wisdom and value of the Common Law, and regarded it as the highest duty of a Court to obey and follow out the maxim of *stare decisis*. Whatever might be his individual opinion as to any particular rule, it was not, in his view, the duty or right of the Court to make changes in the law, which changes would necessarily be retrospective in their effect and work inevitable injustice.

In judging his opinions, it should be remembered that during his later years, Judge Sharswood endured such incessant suffering, that he once re-

marked, that for years, he had never known a waking hour without the consciousness of pain. Even this pain was, at times, a welcome relief to his anxiety for an only son, a young lawyer of great promise, who died of consumption, after a lingering illness of some years, shortly before Judge Sharswood's retirement from the bench.

He was registered as a law student in 1828, and including the years of preparation, which proved to have been virtually appropriated to the public—for, as he was about to begin to earn a remunerative income, he was appointed to the District Court—he had spent more than half a century in the service of the Commonwealth. From his appointment to a seat upon the District Court in 1845, to the end of 1882, at the close of his term as Chief-Justice, he had devoted himself exclusively and unremittingly to his judicial duties. At the Bar meeting held after his death, in May, 1883, Mr. Eli K. Price related that Judge Sharswood had once consulted him as to the best method of disposing of a tract of real estate in the suburbs of the city, which had come to him by inheritance. Mr. Price advised him to sell it out in building lots, reserving ground rents, to which he replied: "That I can not do—that would take time and attention which belongs to the public. This I have never permitted myself to do." Mr. Price added that he accepted the wholesale price and invested in City loans.

In the discharge of his duties as Judge, he recog-

nized that the members of his bar were co-workers with himself, without whose coöperation he could not succeed. In one of his speeches at a Bar meeting, in speaking of the bench and bar, he used the expression: "We are all one brotherhood," and this thought was always a controlling one.

When in the District Court, he knew every member of the bar by name, and took a personal interest in every young man of promise. If an application were made to him to enforce discipline, he made it a rule to send for the accused, and to give him an opportunity, if at fault, to make good, and by his kindly admonition, he saved more than one from professional ruin. Ready to encourage and counsel every lawyer because he was a member of his bar, there were others bound to him in terms of close friendship as with hooks of steel. Hospitable and companionable, he was the most gracious of hosts, and the most welcome of guests. Fond of talk, his fund of anecdotes, his store of traditions, his fullness of knowledge upon every subject, made him a charming and instructive companion, and whenever he appeared at any social gathering, or when receiving his friends at his own house, he was always the center of interest. He kept in touch with young men and their pursuits, until the exactions of the Appellate Court made it necessary for him to husband his strength.

He never lost his relish for general reading, nor his concern in public questions. He was a firm be-

liever in the theories as to the true function of government, which had been developed by Adam Smith and Thomas Jefferson, and which have more recently been enforced by Herbert Spencer. The prosperity created by legislation, was, in his opinion, always fictitious, and a favorite illustration was the fact that the assessed value of the property in the counties through which the State canals had been constructed, declined after their completion, below what it had been before the canals were begun.

He was opposed to any interference with the liberty of the individual and the freedom of trade, by tariffs for the sake of protection, or other similar legislation. He looked upon the creation of irredeemable paper currency as the most mischievous of economic mistakes, as well as an unconstitutional usurpation of the power by Congress.

Such views were, at one time, unpalatable to many of his fellow citizens, but still find favor with some.

He gave such time as he could spare to other interests. He was President of the Board of the Deaf and Dumb Asylum, and Trustee of the University of Pennsylvania; an elder in the Presbyterian Church, Trustee of the General Assembly and Director of the Princeton Seminary—and for some years, Vice-President of the American Philosophical Society.

He once acquired a reading knowledge of Hebrew to assist a clerical friend who had lost his sight, and for years conducted a Bible class, where his

familiarity with the original texts made his teachings peculiarly interesting.

For some years he was a fairly regular attendant at the readings of the Philadelphia Shakespeare Society.

Subsequently, he acceded to the request of some of his friends, and joined in a course of reading in Political Economy, and in the course of a few years, the members read and discussed all of the more important text books, from Adam Smith down. His real life, however, was in the law, and in the men of the law; and upon them his personality made an impression that still endures. They looked up to him as their exemplar and ideal. To them he was more than his works, and his character was more than his attainments.

The influence exerted during his life, apparently operates unspent and with undiminished force to the present day, and there seems reason to anticipate that for generations to come, his character and career may continue to inspire the members of the Pennsylvania Bar, with something of his own sense of duty.



**GEORGE WASHINGTON STONE.**





GEORGE WASHINGTON STONE

From a photograph taken when Judge Stone was about eighty years of age—two years before his death.







# GEORGE WASHINGTON STONE.

1811-1894.

BY

FRANCIS GORDON CAFFEY,

*of the New York and Alabama Bars.*

**T**HOUGH born in Virginia, reared in Tennessee and past the age of twenty-two when he went to Alabama, Judge Stone spent so large a part of his life in Alabama, and so large a portion of that part in her public service that he will always be regarded as an Alabamian. At the time of his going to the state, it had been but fifteen years in the Union and was enjoying a heyday of prosperity, which has been humorously portrayed in Joseph G. Baldwin's "Flush times in Alabama and Mississippi." The sixty years of his life there, of which twenty-six and a half were spent in active practice at the bar and thirty-three and a half on the bench, covered periods of great changes; he shared the fortunes of the state, its ups and downs, from its youth to its maturity, and although, for a good portion of the time, by reason of his judicial position, he, in some sense, stood apart from the main current of the people's life, so powerful, direct, and continuous was his influence upon affairs that in order to give his

portrait its proper background it would be necessary to detail the principal events of the state's history for more than half a century. No such elaboration will be attempted here.

He saw Alabama's population increase from a little more than 300,000 to more than 1,500,000; he saw his people go through and recover from financial panic, rise to great prosperity, spend their all in fruitless war, fall into bitter poverty, and rise again to prosperity; he witnessed the development and destruction of a system of slave labor and the substitution of a system of free labor; he was a part of the judicial administration of the state during the peaceful years of its early growth, during the stormy debate preceding the Civil War, during the struggle and distress of war itself, during the recovery from the horrors of Reconstruction, and during the years of rehabilitation and the dawning of a prosperity far greater than that enjoyed under slavery. He was trained at Alabama's bar when the meager facilities for practice on circuit demanded originality, hardiness and industry, and the period of his greatest activities as a practitioner covered years when the complications and entanglements of post-bellum affairs, both public and private, and the passion and gloom aroused by misgovernment required the most loyal and unselfish service of sound lawyers. Through all these changes he was either in practice or on the bench; he was essentially a lawyer, but pre-eminently a judge. When he died, though he had

come as a stranger, the Governor of his adopted state said of him in an official proclamation, "No man ever lived in Alabama who did her more honor; and none ever died within her borders whose loss was a greater calamity to the state."

George Washington Stone was descended from good English stock. He was the son of Micajah and Sarah Leftwitch Stone, and was born in Bedford County, Virginia, October 24th, 1811. He was one of a family of seven sons and three daughters. At the age of six years he went with his parents to Lincoln County, Tennessee. His father was a planter in comfortable circumstances, but died when the son was but sixteen. He never had a collegiate education and his schooling consisted of the ordinary training then to be had in an "old field" country school and a village academy. After his father's death he engaged in some mercantile pursuit, but began the study of law as he approached his majority. He became a student in the office of James Fulton, then a distinguished member of the bar of Fayetteville, Tennessee, and was licensed to practice law in 1834. He removed immediately to Alabama and for a few months taught school in Coosa County. In May, 1834, he was admitted to the bar in Talladega County and commenced practice at Syllauga in that county. He was for a time postmaster at Syllauga and remained there until 1840, when he removed to the town of Talladega, where he practiced for three years, being for a part of the time in

partnership with William P. Chilton, afterwards Chief-Justice of the Alabama Supreme Court. In August, 1843, he was appointed by Governor Fitzpatrick to fill a vacancy on the Circuit Court bench created by the death of Judge Eli Shortridge. In December, 1843, after a spirited contest, he was elected by the Legislature Circuit Judge for a full term of six years. In January, 1849, before the expiration of his term, he resigned from the Circuit bench and removed to Hayneville, Lowndes County. There he practiced for seven years, having as partners in succession Nathan Cook, Thomas J. Judge, and S. Perry Nesmith. In January, 1856, he was elected by the Legislature Associate-Justice of the Supreme Court, defeating Robert C. Brickell and David Clopton, with both of whom he was afterwards associated on the bench. Mr. Clopton was also afterwards his law partner. He removed that year to Montgomery and lived there until his death, a period of thirty-eight years. In 1862, he was re-elected Associate Justice and continued on the Supreme Court bench until the latter part of 1865, when, in the course of the reconstruction of the court, he failed of election, being defeated by William M. Byrd. He immediately entered upon active practice at Montgomery. In the latter part of 1866 he formed the firm of Stone, Clopton & Clanton, his partners being David Clopton and James H. Clanton. General Clanton died in 1871 and thereafter he continued with Mr. Clopton, under the



firm name of Stone & Clopton, until March, 1876, when he was appointed Associate-Justice of the Supreme Court. From that time he served continuously for eighteen years on the Supreme Court bench,—until his death in March, 1894.

During each of the periods in which he practiced his profession, he was a member of a local bar of able lawyers. Of his career at the Talladega bar there is little record. He occasionally appeared in the Supreme Court, after he was licensed to practice there on June 15th, 1839, and while only moderately successful with his appeals, his practice was evidently of respectable proportions. At the Hayneville bar he was very active, and his practice after his retirement from the Supreme Court bench, during the years 1866 to 1876, when the Montgomery bar was composed of a set of legal giants, was of the best class and was extensive and important. As a practitioner he was laborious and careful. He was a master of chancery practice, but never very successful before juries on the law side of the docket. His style of oral argument was plain and forcible, but he lacked the power of convincing jurors. In Judge Clopton, however, he had, while at the Montgomery bar, as a partner, an advocate as artful and as honorable as ever adorned the profession in Alabama. As an advisory counsel he was prudent and far-seeing. He was expert as a conveyancer and wrote deeds, wills and other legal documents in a number of families for several generations. In spite of his skill and care

in such work he once felt compelled as a judge to declare void an instrument which he himself had prepared while at the bar. This decision is said to have been the reason for the enactment of the statute now in force in Alabama forbidding a judge to sit in a cause involving the validity or construction of an instrument prepared by himself. His standard of practice was so scrupulous that he was reputed to have persistently declined retainers in cases of whose justness he was not convinced. As a young man he was aggressive and impetuous and was always determined in disposition and somewhat irascible in temper. His opponents in practice not infrequently took advantage of the latter characteristic and, particularly in jury trials, were able at times, by stirring up his wrath, to divert him from the main issues of his case. He was courageous and, especially when he felt that fraud or injustice had been attempted, he was vigorous in the presentation of his cases. Once convinced of error he was ready to make amends. His willingness to admit a mistake is illustrated by his having on the bench held unconstitutional a statute which he had himself drawn. He was extremely careful in observing his obligations, but not infrequently, after an agreement had been made with opposing counsel, he declined to sign a written stipulation on the ground that his word was as good as his bond.

Little record is preserved of his work on the Circuit bench. The reports of the Supreme Court dur-

ing the years 1843 to 1849 show many appeals from his decisions, and that about as many of these decisions were reversed as were affirmed.

His record as a judge, so far as it is preserved at all, is found in the published reports of the decisions of the Supreme Court, which has always been the court of last resort in Alabama. Forty-five volumes of these reports were published before he became a member of the court. Of the seventy-five volumes thereafter published, including volume 102 of Alabama reports, in which his last decisions appear, his opinions appear in sixty-two volumes. He wrote approximately one-sixth of the total number of opinions of the court published in the one hundred and twenty volumes containing the work of the court during the seventy-five years of its existence up to the date of his death. Including the Circuit Judges, who, sitting collectively, composed the court up to 1832, there were during this time forty-four members and, excluding those who were Circuit Judges only, there were thirty-four members of the court. The proportion of the opinions written by him is perhaps not an unfair criterion of his influence on the development of the law in Alabama.

The first period of his service on the Supreme Court bench was as an Associate-Justice from January 15th, 1856, to the latter part of 1865. The records do not make clear the exact date when it ended. For a part of the year 1865 the state was under military rule and no sessions of the court were held. It

is certain, however, that he was off the bench prior to January 1st, 1866, as on that date a new set of judges, elected by the Legislature November 30th, 1865, were in office. His associates were Samuel F. Rice, Chief-Justice, until January, 1859; A. J. Walker, Associate-Justice until Judge Rice's retirement, and then Chief-Justice; Richard W. Walker, Associate-Justice from 1859 to 1864; and John D. Phelan, Associate-Justice in 1864 and 1865. The bench during this entire time was an able one, and he did his full part in earning for it the respect which it then inspired and has ever since enjoyed among the bar of the state.

His service of this period was rendered between the ages of forty-four and fifty-five, after a preliminary experience of five and a half years on the Circuit bench and two periods of practice at the bar of nine and seven years. He was a mature, well-rounded lawyer, and had he never again sat on the bench his rank as a judge, based entirely on his decisions from 1856 to 1865, would have been high. The court was nearly always unanimous and did its best work by presenting to the state a body of clear and well-reasoned decisions upon every-day subjects. His style was simple and straightforward, and entirely lacking in ornamentation. His opinions were logical and well-reasoned and marked by research and thorough citation of authorities, but were usually brief and to the point. The cases cited from other jurisdictions were most frequently from the English,

New York and Massachusetts courts. While he showed great respect for precedents and looked always to the reasons for and the history of the law, upon questions not settled in Alabama, he was vigorous and independent in his views. The Code of 1852 for the first time collected into one volume the statute law of the state, and he did much toward settling the construction of provisions in it which have been carried into the subsequent codes of the state. An interesting, though now obsolete, set of his decisions, which constituted a considerable portion of his work of this period, dealt with the rights of, and in respect to, slaves. The contemporary popular excitement did not manifest itself in the court's decisions. There was nothing in them indicative of the brewing storm. One not knowing or observing the dates of the decisions might read the entire body of the Alabama reports immediately preceding the War without the slightest hint of the political changes which were occurring. There could be no finer tribute to the strength of our system of government than the perfect calm which prevailed among the judiciary at this time. Popular sentiment was not reflected on the bench, and justice as it affected private rights continued to be administered as dispassionately as if nothing unusual were occurring. Even during the War itself, a like calmness prevailed on the bench and the existence of war could never have been discovered from reports of the court's decisions except for the "conscript cases" hereafter referred to and a

few other cases in which the fact of hostilities had to be recognized.

The court took the secession of the state, the formation of the Confederate Constitution, and the laws passed by the Confederate Congress as matters of course. The only questions of considerable public importance upon which Judge Stone expressed himself at the time were in the cases relating to military service. His opinions in these cases were of great contemporary, and are now of historical, interest. The War had not progressed far when the Congress of the Confederate States, acting under the clauses in the Constitution authorizing the general government to declare and conduct war, passed laws providing for conscripting troops. It also regulated by statute the furnishing of substitutes. Immediately contentions arose in the several states as to the meaning and validity of these laws. In some of the states the jealousy for the inviolability of the rights of the states caused resistance to the enforcement of these laws, and some of the local state courts in large measure condoned such resistance. Not so in Alabama. Promptly, so soon as the question got before the Supreme Court, the general government's conduct was upheld and declared not to be in violation of state rights. Judge Stone delivered in the first of these cases elaborate opinions in which he undertook to define the dividing line between the rights of the local and general governments. The authorities cited were taken generally from the Supreme Court of the

United States and curiously the latter court has since cited and approved some of Judge Stone's decisions.

In *Ex parte Hill, in re Willis vs. Confederate States*,<sup>1</sup> he laid down, in general terms, his view of state rights, as follows:

I am of that school who believe that the Confederate government is one of limited and defined powers, and that great care should at all times be exercised, to prevent it from enlarging its powers by construction. Our compound system of government, perhaps, exposes the States to encroachments upon their reserved rights, more than any other form of constitutional government could do. This grows, in part, out of the fact, that, within the sphere of their operation, the Constitution of the Confederate States, and the acts of Congress passed pursuant thereto, are the supreme law of the land. The Constitution, in addition to its enabling clauses, which confer powers on the government, contains several restraints upon State authority. Under these clauses, an appellate jurisdiction was built up in the Supreme Court of the United States, which, in my opinion, was, in some instances, carried to an extent of doubtful propriety. I will not discuss this question here, further than to say, that I think many of the imputed errors which crept into the old system grew out of the mistaken theory of the oneness of our distinct governments, and the too great subordination of the State to the Federal government. One source of alleged encroachment of Federal upon State authority has been removed, by a wise amendment of the second section of the third article of the Constitution; the other amendments have also shorn our young government of much of the power which the old one wielded to our detriment. I hope that, when the Confederate judiciary shall be fully organized, the heresies which aided in overthrowing the old Union, will not be allowed to enter the sanctuaries of the new.

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<sup>1</sup> 38 Alabama Reports, 429.

I do not mean, in what I have said, to question the distinguished ability which has, at all times, marked the long and brilliant history of the Federal Supreme Court. My precise meaning is, that, in my judgment, false views of the powers of the Federal government, and especially of the relations which the States sustain to that government, found utterance at an early day; and that the court in later years, although it burst some of the fetters by which early precedent had sought to confine it, left many of those errors unreversed. Let us avail ourselves of the much good bequeathed to us by the many able minds which have adorned that bench of every period of its history; but let us avoid the errors which time and experience have made manifest.

I have said that an early error crept into our system, as to the relation which the Federal and State governments sustain to each other. In my opinion, we should struggle, from the very threshold of our existence, to keep the powers and functions of the two governments as distinct as possible. The dividing line of jurisdiction, where no territorial boundary marks it, must, in the nature of things, be sometimes difficult of ascertainment. Still, the line exists, and, when discovered, must be respected. It is history, now made sadly impressive by the ocean of noble blood which it has caused to flow, that by transgressions of this boundary line, sometimes by the Federal, and sometimes by State governments, our once prosperous and happy country is now the theater of a war of almost unprecedented malignity and atrocity. That enlightened jurist and venerated patriot, Chief-Justice Taney, speaking for the court, felt and expressed the necessity of preventing encroachments by one jurisdiction upon the other; but his counsels came when fanaticism had well-nigh matured its parricidal plot, the culmination of which is now converting portions of our rich domain into a desolation.

The jurisdictional area of each government should be kept distinct—restraining the Confederate government within the boundaries of its delegated authority, and not allowing the State governments to trespass on Confederate jurisdiction. The pow-



ers conferred on that government by the Confederate Constitution, the laws enacted under its authority, and treaties made pursuant thereto, are the supreme law of the land. Let us respect and obey them as such. Let us not weaken or destroy our Confederate power, by embarrassing that government in the manly exercise of those functions with which the States themselves have clothed it. This will neither destroy nor impair the sovereignty of the several States. They are not despotisms. For certain general purposes, they have conferred on the Confederate government certain attributes of their sovereignty; but they retain the others. They have thus become constitutional, instead of absolute sovereignties. This no more destroys State sovereignty, than does the surrender of certain attributes of natural liberty destroy civil liberty. In upholding and maintaining each government in the exercise of its constitutional authority, each will necessarily be kept within the appointed orbit of its powers. This, I humbly conceive, would effectually prevent all collision of jurisdictions. It need not, and would not, interdict the comities and kind offices which belong to good neighborhood. These should be cultivated and strengthened, as the life blood of our confederate existence.

In *Ex parte Hill, in re Armistead vs. Confederate States*,<sup>2</sup> he set forth more specific rules for determining the line between the judicial authority of the general and local governments:

The precise line of division which separates State and Confederate judicial authority, is not always easy of expression, if indeed it be easy of ascertainment. Operating, (within the sphere of its appointed powers), as each government confessedly does, upon the same territorial area, and upon the same persons, it requires, in some cases, the closest scrutiny to prevent encroachment by one power upon the other. If either government, in the

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<sup>2</sup> 38 Alabama Reports, 458.

performance of its functions, by mistake or otherwise, transgress the boundary line which separates them, and trespass on the domain of another, such conduct does not conclude the other government, nor estop it from asserting and enforcing its own rights. On the other hand, if either government, or its officers, act within the sphere of its powers, although such action may be erroneous and reversible, it is not, except in certain specified cases, within the power of the other government to control its action thus performed, nor to correct the errors that may be committed. The distinction is between a want of authority over the person or thing, and an erroneous exercise of authority possessed. If the subject-matter be within the legal cognizance of the officer acting, no matter how far that officer may err in adjudicating or applying the law to such subject-matter, the redress, if any, must, as a general rule, be sought in the courts of the government whose officer has committed the error. But, if the officer exercise authority over a subject or person not within his official cognizance, the judicial officers of the other government may give redress, if the subject-matter be within the general scope of their jurisdiction.

After discussing the decisions of the Supreme Court of the United States in *Slocum vs. Mayberry*,<sup>3</sup> and *M'Clung vs. Silliman*,<sup>4</sup> he said that these cases established the following propositions:

First: Whenever an officer, under authority in the premises conferred by the government under which he is acting, is in the performance of official duties; and, in the performance of such duties, there is expressed, or necessarily implied, the right to decide upon qualifications, or to draw inferences from facts, then any error of conclusion, or of judgment, into which he may fall, is not subject to revision or correction by the officers of the other

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<sup>3</sup> 2 Wheaton's Reports, 1.

<sup>4</sup> 6 Wheaton's Reports, 598.

government, nor is the officer acting subject to the coercive control thereof, unless the Constitution or laws give to the officers of the latter government such control or power of revision.

Second: Whenever the question is—not whether the officer correctly decided or acted in a matter within the scope of his power and jurisdiction—but, the inquiry is, has he erroneously applied his authority or jurisdiction to a person or subject-matter not within its scope, then the courts of the other government, if the subject and person be of a class which comes within their jurisdiction, may inquire of and determine the question of such erroneous application of authority, unless the law, in its terms, inhibit such inquiry.

In *The State ex rel. Dawson, in re Strawbridge and Mays*<sup>5</sup> where Confederate and State statutes relating to the military service came into conflict, he squarely declared the supremacy of the Confederate law in the following words:

The laws of Congress for raising an army, and the laws for organizing the militia, and giving authority to call them out, to execute the laws of the Confederate States, suppress insurrections, and repel invasions, are made in pursuance of the Constitution of the Confederate States, and are therefore the supreme law of the land. The State law, though constitutional, if it cannot have operation without coming in collision with the act of Congress thus constitutionally enacted, must, for the time, yield the precedence to this supreme law.

In 1876, when Judge Stone returned to the Supreme Court bench, he was in his sixty-fifth year and at the height of his powers; yet, one would scarcely then have predicted that he would see eighteen years more of active service as a judge, and thus

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<sup>5</sup> 39 Alabama Reports, 367.

complete a record remarkable in all respects and in some respects perhaps unsurpassed by any English or American judge.

From 1832 to 1889, with the exception of the years 1852-4, when Judge Stone was not on the bench, the Supreme Court was composed of only three members. In 1889 the number was increased to four, and in 1891 to five. His associates during his second period on this bench were Robert C. Brickell from 1876 to 1884, Amos R. Manning from 1876 to 1880, Henderson M. Somerville from 1880 to 1890, David Clopton from 1884 to 1892, Thomas N. McClellan from 1889 to 1894, Thomas W. Coleman from 1890 to 1894, Richard W. Walker in 1891-2, William S. Thorington for a few months in 1892, and James B. Head and Jonathan Haralson from 1892 to 1894. Several of these judges saw further service. Judge Haralson is still a member of the court and Judge McClellan served continuously until his death in February, 1906. But none of them who had come on the bench by election failed of reelection if he sought it, except on one occasion when two of them were at the same time candidates for Chief-Justice. This is an instance of the permanency of tenure of judicial office under the elective system in Alabama,—even more signally illustrated in the case of Judge Stone himself.

In March, 1876, he was appointed by Governor Houston Associate-Justice to fill a vacancy caused by the death of Thomas J. Judge, who had been one

of his partners when he was at the Hayneville bar. The unexpired term was for four and one-half years, and, the Constitution having been changed with respect to the mode of election since he was formerly on the bench, he was elected by the people in 1880 Associate-Justice for a term of six years. In 1884 he was appointed Chief-Justice by Governor O'Neal to succeed Robert C. Brickell, resigned. In 1886 he was elected Chief-Justice for a term of six years and reelected in 1892. He continued to serve as Chief-Justice until his death at Montgomery on March 11th, 1894.

During his ten years of service from 1856 to 1865 he wrote 491 opinions which have been published, or an average of 49 each year. When he returned to the bench in 1876 the docket of the court was much crowded, owing to the great mass of post-bellum litigation and the numerous appeals from inefficient Reconstruction courts, and in one year he wrote 175 published opinions.

During the eighteen years from March, 1876, to March, 1894, he wrote 1,958 opinions which have been published in the Alabama reports, or an average of 109 each year. The total number of his opinions during twenty-eight years on the Supreme Court bench was 2,449, or an average of 87 per year. The increase in number during the second period is noticeable. The growth of population and property values in the state necessarily increased the business of the court. It is believed that no English or Amer-

ican judge of a court of last resort has ever written so many opinions, and few have written so large an average number a year. The numbers are the more remarkable when it is known that he never employed a stenographer or amanuensis, that he wrote very slowly with his own hand and that, while not diffuse, his opinions are thorough discussions of the subjects with which they deal and are exceptionally full of careful citations of authorities.

Thirty-four of his decisions have been overruled and thirteen of these he participated in overruling,—dissenting only once. Three of the overruled cases involved questions of law which were brought before the court for reargument almost immediately after being decided, and all but two or three of the others can be fairly said to have involved either mere questions of practice or of forms of pleading or questions which were unsettled by reason of the court never having been unanimous upon them or because of lack of harmony in expressions which, through a series of years, had crept into the court's opinions.

Had Judge Stone not gone back to the Supreme Court bench, he would have ranked as a good judge, because of the valuable contribution he made to the decisions of the court during his first term of service. That he is entitled to rank as a great judge is due primarily to his work during his second period of service. But, alike in both periods, the strength of his decisions is due to their conservative adherence to sound principles; to the absence, rather than to the

presence, of the unusual or remarkable. The dominant characteristic of his decisions is sturdy common sense. His style, though not scholarly, is clear, concise and direct, and, as he grew older, was even more concise than during his early years on the bench. He was almost devoid of imagination and rarely indulged in figures of speech or illustrations. His opinions during the second period, as did those of the first period, dealt for the most part with the ordinary questions of private rights and commercial law, and he had before him few questions of general popular interest. The even tenor of his decisions and of the court's decisions established him and the court in the confidence both of the bar and of the public. He made a profound impression by his strict integrity, by the rigid morality underlying his decisions, and by his strong judicial courage. These qualities, more than particular decisions, constitute his main contribution to the influence of the bench in Alabama. He went back to the court at a time when but recently, through a series of years, it had been weak in the confidence of the people. He was the prime influence in reestablishing it in popular esteem and remained to the end of his life the dominating judicial figure in the eyes both of the bar and of the people.

When he returned to the bench, the state was just beginning its recovery from the poverty and misrule from which it had suffered since the War. His service in this new term was contemporaneous with

a gradual return to normal conditions throughout the state and a very marked development of material prosperity in the mineral sections of the state.

So great is the mass of his decisions during his second term on the bench that it is impracticable, within a short space, to give any adequate summary of them; but three things stand out clearly,—his inflexible enforcement of the law in homicide cases, his hatred of frauds, and his adherence to sound principles of corporation law.

The great increase of homicide cases coming before the court after the War is very noticeable. The disturbed condition of society after the War and the beginning of friction between the races brought in their train a carnival of crime, and particularly of homicides, from the effects of which the state has not even yet recovered. The judiciary set its face as flint against this evil and one of the features of Judge Stone's decisions is the sternness and vigor with which he fought for the suppression of homicides. As an incident to this warfare, he very strictly enforced the statute forbidding the carrying of concealed weapons; and the hardness of his judicial character is illustrated by the fact that in affirming the conviction of a son of one of his old friends for a violation of this statute, he made a point of commending the policy of making examples of "offenders in high social position." This, however, led the defendant to ask the congratulations of his associates upon being the only man in the state who had



obtained an official adjudication of his social rank.

Previous to the War there were few corporations in the state and it is not unusual to find a volume of ante-bellum reports of the Supreme Court containing no decision of a question of corporation law. As the state has developed since the War, corporations have there, as elsewhere, taken over the conduct of a large proportion of business. In consequence, during his second period on the bench, Judge Stone had before him many corporation questions; and his decisions have contributed much to the development of an excellent body of corporation law in Alabama. He never yielded to popular prejudices against corporations, but was always steadfast in the enforcement of the obligations of stockholders to make full payment of subscriptions to stock and in holding directors and other corporate officials to the performance of their fiduciary duties.

The third aspect of his decisions, which is notable, was his steady antagonism to fraud and his contribution to a body of sound commercial law. The year before his death he said at a meeting of the State Bar Association, in response to an allusion to his influence on this branch of the law, "I have endeavored to make the way of the fraudulent man, the deceiver, the fraud-worker, as difficult and hard as I could make it."

Apart from his court decisions, he wrote little. In 1866 he and John W. Shepherd collected the state criminal laws, for the first time, into one volume,

called the "Alabama Penal Code," which has been the basis of the subsequent criminal codes of the state. For many years he advocated simplification in pleadings and in the administration of the law. Alabama has always had separate courts of equity, and common law jurisdiction and pleadings only slightly varying from old common law forms are in use there. The technical accuracy necessary for successful practice under this system tends to make good lawyers, but results in a large proportion of cases being determined upon questions which do not affect the merits. He saw little accomplished towards the amelioration of this condition during his lifetime; but his strong arguments will doubtless some day prevail as the commercial necessity for quicker dispatch of the business of the courts becomes more apparent.

Though always a Democrat, Judge Stone took little part in party politics. In 1849 he was one of four candidates for his party's nomination for Governor in a convention which, after two days' balloting, nominated Henry W. Collier, and in 1856 was an unsuccessful candidate of his party for Representative from Lowndes County in the State General Assembly. He seems never again to have been a candidate for any but judicial office. After his eightieth year, however, he wrote a series of articles, published during the campaign of 1892, which show that he was keenly alive to political questions. With great vigor and a wealth of historical knowledge he

discussed, from both legal and economic standpoints, the tariff and the issues made by the Populist party in their so-called "Ocala platform." At the time there was a great deal of political dissension in the state. He went very thoroughly over the current arguments concerning protection and the workings of the McKinley tariff law and supported the views then most prominently championed by Roger Q. Mills. He opposed, for both practical and constitutional reasons, the government ownership of railroads and the establishment of federal sub-treasuries in the various states to loan money at a rate of not exceeding two per cent on non-perishable farm products and real estate and the arbitrary increase of the per capita circulation to not less than \$50. He approved the policy of an income tax, but questioned the legality of some phases of the scheme then proposed. While declaring himself to be a bimetallist, he confessed himself not sufficiently informed upon the silver question "to lay down any absolute maxims in the solution of this very complex problem." He sympathized with and justified much of the popular discontent then prevalent throughout the country and ascribed it primarily to the unequal operation of the tariff and other federal laws. He emphatically denounced the so-called "Force Bill," the increase of the powers exercised by the Federal Government and the constantly growing encroachment by the general Government upon the governmental functions properly belonging to the states. He roundly ap-

plauded the first administration of Mr. Cleveland and praised his character personally and as a public official. The whole series of articles appealed for harmony in the Democratic party and a united effort for the success of the National Democratic ticket.

His arguments themselves were judicially phrased; none could have properly questioned their propriety because they emanated from a judge; and they were put with a vigor and enthusiasm that betokened an almost youthful interest in current affairs.

Like many other judges he was given to writing verses. One small volume of these was printed for private circulation in 1871. They cannot be said to surpass in value the average judicial verse. They deal mostly with family incidents and the Confederate cause. They are tender in sentiment, but are matter-of-fact and lacking in imaginative quality. It is difficult to realize that such meritorious judicial opinions and such unmeritorious verse as Judge Stone wrote could have been written by the same man.

Throughout his life he was fond of his violin, which he played much in his hours of leisure and entirely by ear. It is said that he always carried it with him when he rode the circuit in the '40s. As he grew older it was his custom to gather his children and grandchildren for the celebration of his birthdays. On these occasions he played his violin, accompanied by some member of the family on the piano, and furnished the music by which the others

danced. Perhaps his best verse was "To my Violin," written in 1869:

In the spring of my life when its fresh morning dew  
Lay soft on my heart, and my pulses beat new,  
Thy notes were as festoons of fragrant, sweet flowers  
That fancy flung over my hoping heart's bowers.

And when o'er my spirit some shadows would fall—  
Some foretastes of sorrow that come to us all,  
Thy soft-breathing numbers would sweep o'er its plains,  
And soothe all its pangs with their soul-stirring strains.

Many, oh many the hours of my life,  
When storm after storm, and strife after strife,  
Across my bruised spirit in fury would roll,  
Thy notes—only thine—could speak peace to my soul.

Mournful, yet sweet, there come clustering around,  
Memories the dearest, evoked by thy sound;  
Memories of loved ones long cherished and deep:  
Speak of them softly; they sleep, oh, they sleep!

The shadows close 'round me, my spirit is dead,  
The frost's on my heart, and the frost's on my head;  
My life's blood is chilly, and feeble in flow;  
Be mournful or silent; 'tis meet to be so!

He was three times married, first in 1834, second in 1849, and third in 1866. The longest period of his widowerhood was after the death of his second wife, from 1862 to 1866, and during that time, shortly before the close of the War, he wrote the "Widower's Lament," which he himself marked "humorous" in his little volume:

I am very tired of single life—  
The truth is that I want a wife;  
A dear, good wife to keep me human,  
A loving-hearted, honest woman.

I'd have her neither stiff nor haughty;  
Neither young nor old; say forty;  
Not too fierce, nor yet a dreamer,  
Not a sulk, and not a screamer.

But somehow it has been my luck  
To love the flowers that others pluck;  
To see the fruit that most I prize  
All gobbled up before my eyes.

I never did a-courting go,  
Or rig me out to play the beau,  
But that the lady, ere I met her,  
Found another she loved better.

It seems to me that surly fate  
Ordains my lot to be too late;  
That all my fondest hopes she dashes,  
And knocks my love-plots all to smashes.

I can't repress a lingering fear,  
That soon or later I shall hear  
That all the women were paired out  
Before my turn was brought about.

Yet, though I'm rather old and ugly,  
My firm joints still fit up snugly;  
And if this war lasts, it may rid us  
Of half the rogues that grab the widows.

He was much devoted to his verses and fond of reading them to his friends. During his early career on the Supreme Court bench he wrote a powerful dissenting opinion, in the case of *Ikelheimer vs. Chapman's Administrators*,<sup>6</sup> discussing the functions of administrators and the jurisdiction of probate courts, which contributed a good deal towards establishing his judicial reputation. When some time afterwards he read some of his latest verses to a member of the bar, he was considerably ruffled by his listener's comment, "Judge, I would rather have written your opinion in the *Ikelheimer* case than all your poetry."

Judge Stone was of medium height, vigorous in constitution, had well-marked features, and, though somewhat austere in demeanor, was exceedingly kind-hearted. He never cultivated a popular manner, but was universally respected and by his intimates was much beloved. He enjoyed social intercourse and was fond of hearing and telling anecdotes. He was courteous and dignified, but strong in his convictions and outspoken and candid in speech. But his distinguishing characteristic was his scrupulous integrity. He was capable of severe and protracted mental labor, was temperate and methodical in habits, very industrious, and went into details with almost painful care. Nevertheless, he was unusually proud of his physique and in his old age was fond of boasting of his prowess in his youth. Even when

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<sup>6</sup> 32 Alabama Reports, 676.

an old man he would not infrequently demonstrate his activity by jumping up and cracking his heels together. His physical vigor continued almost to the end of his life. His final illness lasted but a few days and previous to that time he had not spent a day in bed for twenty-five years. He was fond of flowers and spent many of his recreation hours in cultivating them. He was a stanch Presbyterian and exemplary, as a rule, in the observance of his church duties. Nevertheless, in 1855 he engaged to fight a duel with George W. Gayle of Dallas County. It is still a tradition that he filled a tree trunk near the village of Hayneville very generously with bullets in the course of his preparation for the event. Fortunately the quarrel was adjusted peacefully. Afterwards he submitted gracefully to the discipline of the church for having been concerned in the affair, and the Legislature at its next session relieved him from the disability to hold public office, which he had incurred, by passing a special act providing that the part of the oath of office which related to duelling, if administered to him, should be confined to a period subsequent to November 1st, 1855.

By his sterling worth, without apparent effort to gain approval and without the engaging personal manners which of themselves attract one's fellows, he grew to be the idol of the bar and perhaps more generally than any other man of his time was regarded as the foremost citizen of his state. At the annual meeting of the State Bar Association in 1893



a special committee was appointed to represent the bar in the celebration of the fiftieth anniversary of his going on the bench. In acknowledging the compliment he said:

The bar of Alabama has been very kind to me, has been very forbearing to me. I have many faults. I am very far from being a faultless man. There are many official faults of mine. No man who is just to himself and his conscience can say he is faultless or infallible. I have made mistakes I have committed errors, official errors, but whenever I have done so I have attempted to correct them, to redress them. If I know myself I have tried to promote the public welfare. I have tried so to shape my official career as to benefit my fellows. I have endeavored, I think, to repay to the public in the best way I could that confidence they have so lavishly bestowed upon me. . . . I have committed many mistakes, but I do not believe a man lives more ready to correct his errors and reform his mistakes than I am. I have courage enough whenever convinced that I am in error to retrace my steps as far as I could. I trust to God I have never failed in that respect.

The occasion was celebrated on August 4th, 1893, by the presentation of an address and a silver cup from the bar and by appropriate speeches. It attracted attention throughout the state and was a genuine, spontaneous tribute of affection to him near the end of a career which had been passed almost wholly in the public eye.

He continued his official duties until within a few days of his death, and died, as he wished "in harness." His long life was one of probity, simplicity and industry; and he truly fulfilled the ideal of "an upright judge, a learned judge."



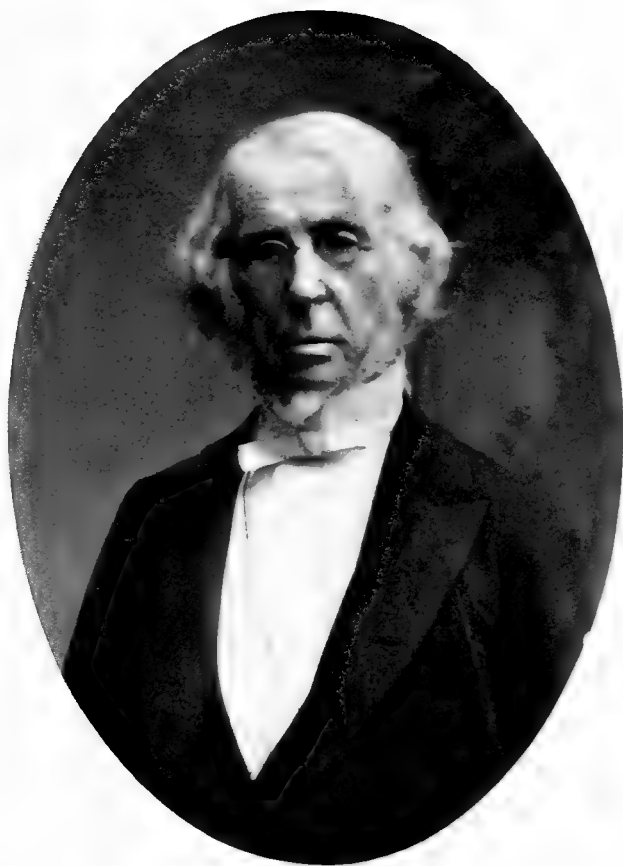
**GEORGE FRANKLIN COMSTOCK.**



GEORGE FRANKLIN COMSTOCK

From a photograph taken in 1889.









# GEORGE FRANKLIN COMSTOCK.

1811-1892.

BY

THADDEUS DAVID KENNESON,

*of the New York Bar.*

**J**UDGE George Franklin Comstock, the subject of this sketch, was born in Williamstown, Oswego County, New York, August 24th, 1811, and died in Syracuse, Onondaga County New York, September 27th, 1892.

His father, Serajah Comstock, was born in Litchfield, Connecticut, and served as a soldier in the Revolution. He entered the army at the age of fifteen and was at the battle of Bunker Hill. He was also at the storming of Yorktown. Leaving the army with the rank of orderly sergeant, he became a small farmer near the country village of Williamstown, where he died when his son was fourteen years of age. Judge Comstock's mother, a woman of much energy and intelligence, afterwards remarried and moved to New Haven, Oswego County, New York, from which place young Comstock went to Union College in the year 1832.

The boy was brought up on the farm, where he had to shift pretty much for himself. He first at-

tended school at the Four Corners. There was a small town library, which during many years was kept in his father's house. It was here that he acquired his love for reading and study. Here he read with avidity Plutarch's "Lives," and Rollin's "Ancient History." He also read a good deal of other biography, modern history and English literature and became greatly interested in Scott's, and Cooper's novels. He attended for a while the Ellensburg Academy in Jefferson County. His boyhood was passed in poverty and his early education was secured in the face of obstacles and vicissitudes overcome only by great natural ability and force of character. Moral courage and self-reliance were with him developed early and ever afterward remained characteristics of his life.

He entered Union College, Schenectady, New York, April 28th, 1832, as a member of the sophomore class. He paid fees for four terms, although in the records of the college he is recorded as absent from the examination at the end of the third term of the sophomore year. How long he was absent during that term is not known. Though he was absent during the whole of the senior year, he nevertheless received the degree of A. B. with his class at its graduation in 1834. The general catalogue of the college shows that he was elected a member of the Phi Beta Kappa Society, but the date or circumstances of his election are not known, nor is it known how he came to receive his Bachelor's degree when

he had not been in college during the senior year. A lawyer, who formerly had an office in Syracuse with Judge Comstock and who now resides in Detroit, Michigan, writes that Judge Comstock told him that because of some "prank" the President of the college, Dr. Eliphalett Nott, advised him to remain at home for one term, that his financial condition rendered the suggestion not unacceptable and that he accepted the position of instructor in Greek and Latin in a private school at Utica and continued teaching there, and later at Syracuse till Dr. Nott sent him his diploma. "The sage Doctor," he adds, "foresaw, I think, that the college could not afford to lose the prestige of the future judge as its graduate." In 1858, while Judge Comstock was a member of the Court of Appeals of the State of New York, he received from his alma mater the degree of Doctor of Laws in recognition of the distinguished service he had rendered as a member of that court.

While teaching at Utica he began the study of the law in the office of Judge Hayden, who was a ripe lawyer. After going to Syracuse in 1834, he went into the office of Colonel William I. Dodge, who had been a state senator from Johnstown, but who subsequently had settled in Syracuse and become district-attorney. Colonel Dodge did not have much business and as young Comstock did not think the opportunity good, after several months he entered the office of the firm of Noxon & Leavenworth, in the winter of 1836. B. Davis Noxon, the head of the

firm, was a lawyer of ability and distinction and the firm had the principal share of the law practice in that part of the country. Mr. Leavenworth ran the business and collecting part of the firm. Speaking late in life of Mr. Noxon, Judge Comstock said:

He was a wonderfully honest man. He would not take a larger fee than he ought to have. At one time he had sent up to him from New York a case to try before the circuit court. It was a small, bothering case. His client sent him fifty dollars and offered to send him as much more. After the trial Noxon sent back twenty-five dollars, saying that he had kept as much as he had earned.

Before Comstock was admitted to the bar, he managed to get into full practice in the Justice's Court and *ex gratia* into the County Court. One term he had five cases and won all of them. He rode the country in his Justice's Court practice. He received five dollars for a day's work and out of it paid one dollar and fifty cents for a horse and buggy, and kept three dollars and fifty cents and thought he did well. He always took "Cowen's Treatise" with him and in that way, as he afterward said, learned more law than he ever did before or later, except when he was reporter of the Court of Appeals.

Comstock was admitted to the bar in July, 1837, and immediately entered into partnership with Noxon & Leavenworth. Not long afterward he married Miss Cornelia Noxon, a daughter of the head of the firm. Speaking later in life Judge Comstock said:

The next year I argued my first case in the Supreme Court, although I was not entitled to until three years after my admission as attorney. It was in special term. At that time the only special term was at Albany. It was held by the different judges in turn, and did all the business of the State. When the code came in, business began to multiply. The code is ruining the bench faster than it is the bar. Before the code I had ten years of hard industrious practice. It was mostly in chancery. Noxon was essentially indolent and the laborious chancery practice all drifted into my hands. For some years there was a large amount of litigation concerning military titles. My first suit of this kind was an ejectment against some people who had settled on a military lot on Cross Lake. I got into the business in that way. I did not take to jury practice much. As a general thing I had no faith in juries. They were Noxon's forte. He and Joshua Spencer were two of the strongest men in the State at *nisi prius*. They traveled the circuit together and were continually pitted against each other. Noxon loved to plague Spencer. Spencer did the best in reply, the best I ever heard anybody do. Yet Noxon would say sharper things; he cut terribly close to the bone. In those days an eight hundred dollar case was one of great magnitude. I remember hearing a judge admonish a jury on that account. I have since earned in one year more than I earned in twenty years in the early part of my life.

At the time Judge Comstock began the practice of the law, equity and law were still administered in New York separately and in different courts. The great courts of the state then were the Court of Chancery, the Supreme Court and the Court for the Trial of Impeachments and Correction of Errors.

The first constitution of the state of New York was adopted April 20th, 1777. It did not in terms

create the Court of Chancery or the Supreme Court. It simply recognized certain courts as then existing. The only new court created by this constitution was the court for the Trial of Impeachments and Correction of Errors under regulations to be established by the legislature. The court was to consist of the president of the senate, the senators, chancellor and judges of the Supreme Court.<sup>1</sup>

Prior to 1822 the Supreme Court was in fact as well as in name the Supreme Court of the state of New York. It was a unit. It consisted of five judges. Those five judges held the circuits in different parts of the state. They also sat in banc and reviewed the determinations made at circuit. A judge sitting in banc was permitted to review his own decisions. In 1821 a constitutional convention was held for the purpose of changing that system. A change was made by which instead of the Supreme Court consisting of judges who did circuit and banc

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<sup>1</sup> Except that when an impeachment should be presented against the Chancellor, or either of the judges of the Supreme Court, the person so impeached should be suspended from exercising his office, until his acquittal; and in like manner, when an appeal from a decree in equity should be heard, the Chancellor should inform the court of the reasons of his decree, but should not have a voice in the final sentence. And if the cause to be determined should be brought up by writ of error, on a question of law, from a judgment in the Supreme Court, the judges of the court should assign the reasons of their judgment, but should not have a voice for the affirmance or reversal.

A constitutional convention held in 1801 and presided over by Aaron Burr, on October 27th, 1801, adopted certain amendments to the constitution of 1777. These amendments, however, in no wise affected the existing judicial system of the state. No change in that system was made till 1822.

duty, three judges were appointed to sit in banc at Albany and the state was divided into eight circuits, in each of which a circuit judge was appointed. Under the constitution of 1822 judges who sat in banc had nothing whatever to do with circuit duty. The Supreme Court in banc, except for some special purposes, was not a court of original jurisdiction. It was an appellate court and an appellate court only. On the other hand the circuit judges who were appointed in the eight judicial circuits had nothing whatever to do with the review of decisions. They were simply trial judges and their office was confined to the discharge of their duties at *nisi prius*. But both systems had one thing in common. Coexisting with them from the adoption of the first constitution down to 1846 was a court of chancery, the business of which was very large. The existence of that court greatly diminished the business of the Supreme Court. Under the constitution of 1822 the Court for the Trial of Impeachments and the Correction of Errors, which had been created by the constitution of 1777, was also continued unchanged.

It was this judicial system which had existed since the constitution of 1822 under which Judge Comstock practiced for the first ten years of his professional life.

In 1846 another convention was held which effected a change more radical than the change wrought by that of 1822. The constitutions of 1777 and 1822 adhered to the appointive system and to

tenure during good behavior or until a fixed age, namely, sixty years. The constitution adopted November 3d, 1846, abolished both. The Court for the Trial of Impeachments and the Correction of Errors was done away with.

It was provided that the Court for the Trial of Impeachments should be composed of the President of the Senate, the Senators or a major part of them, and the Judges of the Court of Appeals or a major part of them.

A Court of Appeals was created to be composed of eight judges, four to be elected by the electors of the state for eight years and four to be selected from the justices of the Supreme Court having the shortest time to sit. Provision was to be made by law for designating one of the number elected, as chief judge, and for selecting such justices of the Supreme Court from time to time, and of so classifying those elected that one should be elected every two years.<sup>2</sup>

<sup>2</sup> It was provided that there should be a Supreme Court having general jurisdiction in law and equity and that the testimony in equity cases should be taken in like manner as in cases at law. The state was to be divided into eight judicial districts. There were to be four justices of the Supreme Court in each district, and as many more in the district composed of the County of New York as might from time to time be authorized by law. They were to be classified so that one of the Justices of each district should go out of office at the end of every two years, and after the expiration of their terms under such classification, the term of office was to be eight years. Provision was to be made by law for designating from time to time, one or more of the said justices, not a judge of the Court of Appeals, to preside at the general terms of the said court to be held in the several districts. Any three or more of the said justices, of whom one of the said justices so designated, should always be one, might hold such



The Legislature provided for a reporter of the decisions of the Court of Appeals denominated "state reporter" to be appointed by the Governor and Lieutenant-Governor and to hold office for three years. He was not to practice as an attorney, counsel or solicitor in any court. By chapter 224, Laws of 1848, the power to appoint the reporter was conferred upon the governor, lieutenant-governor and attorney-general and the restriction upon the right to practice law was repealed.

Judge Comstock was appointed the first reporter

general terms. Any one or more of the justices might hold special terms and circuit courts, and any one of them might preside in courts of Oyer and Terminer in any county.

The judges of the Court of Appeals were to be elected by the electors of the state, and the justices of the Supreme Court by the electors of the several judicial districts, at such times as might be prescribed by law.

In case the office of any judge of the Court of Appeals or justice of the Supreme Court should become vacant before the expiration of the regular term for which he was elected, the vacancy might be filled by appointment by the Governor until it should be supplied at the next general election of judges, when it should be filled by election for the residue of the unexpired term.

It was provided that the Legislature, at its first session after the adoption of said constitution, should provide for the organization of the Court of Appeals, for transferring to it the business pending in the Court for the Correction of Errors, and for the allowance of writs of error and appeals to the Court of Appeals, from the judgment and decrees of the then court of Chancery and Supreme Court and all the courts that might be organized under said constitution.

The offices of chancellor, justice of the existing Supreme Court, circuit judge, vice-chancellor, assistant vice-chancellor, judge of the existing county courts of each county, supreme court commissioner, master in chancery, examiner in chancery and surrogate except (otherwise provided) were abolished from and after the first Monday of July, 1847.

of the Court of Appeals in 1847 and served a full term of three years. At the end of his term, Henry R. Selden, afterwards a judge of the Court of Appeals, became a candidate for the place. The political complexion of the appointing officers had changed. The lieutenant-governor and attorney-general favored Selden and the governor, Judge Comstock. One day the lieutenant-governor and attorney-general entered the governor's office and announced that they had come to appoint a reporter. The governor took his hat and walked out and the other officers

Article I, section 17 of the constitution of 1846, provided that the legislature, at its first session after the adoption of said constitution, should appoint three commissioners, whose duty it should be to reduce into a written and systematic code the whole body of the law of the state, or so much or such parts thereof as to the said commissioners should seem practicable and expedient.

Article VI, section 24 of the constitution of 1846 provided that the legislature, at its first session after the adoption of said constitution, should provide for the appointment of three commissioners, whose duty it should be to revise, reform, simplify and abridge the rules of practice, pleadings, forms and proceedings of the courts of record of the state, and to report thereon to the legislature, subject to their adoption and amendment from time to time.

The legislature by an act passed April 8th, 1847 (L. 1847, Ch. 59) appointed Reuben H. Walworth, Alvah Worden and John A. Collier "commissioners of the code" to perform the duties specified in section 17 of Article I of the constitution of 1846. They were to hold office for two years.

Chancellor Walworth declined to serve and Anthony L. Robertson was appointed in his place (L. 1847, Ch. 287.) Mr. Collier afterwards resigned and on January 18th, 1848, Seth C. Hawley was appointed in his place by a resolution of the Senate concurred in by the Assembly the same day. On April 10th, 1849, two days after the expiration of office of the commissioners as fixed by the Act of 1847, the legislature by a new Act (L. 1849, Ch. 312) appointed John C. Spencer, Alvah Worden and Seth C. Hawley "commissioners of the code" to hold

appointed Selden. Judge Comstock refused to give up the place and a legal contest for the same was decided in his favor. He then resigned.

Four volumes of reports known as "Comstock's Reports," show his work and that of the court during this period. He wrote every head-note himself. His head-notes exhibit the same power of clear and compact statement which later characterized his judicial opinions.

Later in life Judge Comstock said that his service as reporter was the best school he ever had for

office for two years. Before the expiration of the term so fixed the legislature abolished the office (L. 1850, Ch. 281). What progress was made by these commissioners is not known.

The legislature by Act passed April 8th, 1847 (L. 1847, Ch. 59) appointed Arphaxed Loomis, Nicholas Hill and David Graham "commissioners on practice and pleading" to perform the duties prescribed in section 24 of Article VI of the constitution of 1846. They were to hold office till February 1st, 1849. Nicholas Hill resigned in September, 1847, and the Senate by a resolution passed September 29th, 1847, and concurred in by the Assembly September 30th, 1847, appointed David Dudley Field in his place. Messrs. Loomis, Graham and Field reported to the legislature of 1848 the draft of an Act, which with a few amendments became a law April 12th, 1848 (L. 1848, Ch. 379) under the title "An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State."

The legislature by an Act passed April 10th, 1849, appointed the same persons commissioners further to revise, reform and abridge the rules, practice, pleadings, forms and proceedings of the courts of the state. They were to hold office till December 31st, 1849.

A substitute, consisting of the Act of 1848, with additions and amendments, was prepared by the same commissioners and was enacted into a law April 11th, 1849 (L. 1849, Ch. 438) under the title "An Act to amend the Act entitled 'An Act to simplify and abridge the Practice, Pleadings and Proceedings of the Courts of this State, passed April 12th, 1848.'" By a subsequent Act (L. 1849, Ch. 439) this act was styled the "Code of Procedure."

learning the law. While he was acting as reporter he continued to practice. His name appears as counsel in the four volumes of his reports, within a period of three years, twenty-three times. In thirteen of these cases he was successful. Twice he was opposed to B. David Noxon, his own father-in-law, and they divided the honors.

After Judge Comstock ceased to be state reporter he was nominated as solicitor for the treasury by President Fillmore and confirmed by the United States Senate in November, 1851. He resigned after

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The legislature on May 12th, 1847, passed an Act entitled: "An Act in relation to the Judiciary" (L. 1847, Ch. 280). The judges of the court of appeals first elected were to be classified by lot to be drawn by the Secretary of State and a certificate of said drawing and classification filed and recorded in his office. The classes were to be numbered one, two, three and four according to the time of service of each; the class having the shortest time to serve being number one, and the term of office of the judge so drawn in class number one, was to end December 31st, 1849; in class number two, December 31st, 1851; in class number three, December 31st, 1853, and in class number four, December 31st, 1855. The judge having the shortest time to serve was to be the chief judge. Four justices of the Supreme Court to be judges of the court of appeals were every year to be elected from the class of said justices having the shortest time to serve; and alternately, first, from the first, third, fifth and seventh judicial districts, and then from the second, fourth, sixth and eighth judicial districts. They were to enter upon their duties as such judges on January 1st and serve one year, except that the first selected should enter upon their duty the first Monday of July, 1847, and continue in office to and including December 31st, 1848. Six judges were to constitute a quorum.

The justices of the Supreme Court first elected were to be classified by lot to be drawn by the Secretary of State and a certificate of said drawing and classification filed and recorded in his office. The classes were to be numbered one, two, three and four, according to the time of service of each. The class having the shortest time to serve being

filling this office but a short time. The records show that he drew pay only for the months of January, February and March, 1852. His father-in-law, B. David Noxon, was in politics an active Whig, and this appointment was doubtless due to his influence with President Fillmore.

In October, 1855, Charles H. Ruggles, one of the judges elected to the Court of Appeals, resigned. At the election held in November of that year, Judge Comstock was elected to fill the unexpired term of Judge Ruggles. His term of office began January 1st, 1856, and ended December 31st, 1861. He was renominated but was defeated at the election in 1861 by his opponent, William B. Wright, by a majority of sixty thousand votes. Judge Wright was a Republican. Judge Comstock was an uncompromising Democrat. This difference of political views is quite sufficient to explain the result in the year 1861.

He wrote one hundred and forty-nine published opinions, ten of them dissenting opinions. They are reported in volumes thirteen to twenty-four both inclusive, of the New York reports.

In the only case in which he wrote a dissenting

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number one, and the term of office of those so drawn in class number one, was to end December 31st, 1849; in class number two, December 31st, 1851; in class number three, December 31st, 1853, and in class number four, December 31st, 1855. The justice in each judicial district, having the shortest time to serve, and not a judge of the Court of Appeals, nor appointed or elected to fill a vacancy in the first class, was to be presiding justice in the Supreme Court. General terms of the Supreme Court were to be held in every county at times prescribed in the Act.

opinion that was reviewed or could be reviewed by a higher court, his views were adopted and the decision reversed. This was the case of *The People ex rel. the Bank of the Commonwealth vs. the Commissioners of Taxes and Assessments for the City and County of New York*.<sup>3</sup> The question involved was the right of the State of New York to tax the capital of a state bank invested in bonds of the United States. The court held that the state had the power. Judge Comstock denied that it had. The judgment was unanimously reversed by the Supreme Court of the United States.<sup>4</sup>

In several other cases in which he dissented and expressed his views, they seem preferable to those of the court. Two instances will suffice:

In *Chrystie vs. Phye* <sup>5</sup> the action was ejectment. The plaintiffs claimed in right of Mrs. Chrystie, a daughter of Mrs. Ludlow, under the will of her grandfather, Thomas Mackaness. Defendants held a conveyance from Mrs. Ludlow and her husband. The testator devised certain land to his daughter, Margaret, afterwards Mrs. Ludlow, her heirs and assigns forever. Should Margaret die unmarried, and without leaving a child surviving her, he devised the same land equally to his daughters Elizabeth and Mary, their heirs and assigns forever. Should Margaret die, either before or after his de-

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<sup>3</sup> New York Reports, 192.

<sup>4</sup> 2 Black's Reports, 620.

<sup>5</sup> 19 New York Reports, 344.

cease, leaving lawful issue, he devised the land to such child or children in fee. In case Margaret should die without leaving issue and at her death, either his daughter Elizabeth or Mary should then be dead, and should have a child or children then living, he devised the share devised to their respective mothers, to such child or children in fee.

All the judges agreed that Margaret took a determinable fee. There was a difference of opinion as to the event which would determine the fee. The majority of the judges were of opinion it was determinable by her death leaving a child and that the fee passed to such child as a purchaser from Thomas Mackaness, and, therefore, plaintiff's title was good. Judge Comstock's view, concurred in by Judge Denio, was that it was determinable only upon her death without a child and as she left a child defendant's title was good.

In *Lawrence vs. Fox*,<sup>6</sup> one Holly owed Lawrence three hundred dollars. Holly loaned three hundred dollars to Fox, and Fox agreed with Holly to pay that sum the next day to Lawrence. Fox broke his agreement with Holly, and Lawrence then sued Fox to recover the three hundred dollars. The court held the action would lie. Judge Comstock dissented. He pointed out that Fox's promise was made not to Lawrence but to Holly, and that the consideration for Fox's promise moved not from Lawrence but from Holly and that there was no privity between

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<sup>6</sup> 20 New York Reports, 268.

Lawrence and Fox. He showed that the question involved had never been decided in the courts of New York, and that all the *dicta* in the New York cases were traceable to the early English case of Dutton vs. Poole,<sup>7</sup> which belonged to a class of cases peculiar and anomalous, in which promises had been made to a parent or person standing in a near relation to the person for whose benefit it had been made and in which, on account of that relation, the beneficiary had been allowed to maintain the action. He cited the later English cases of Crow vs. Rogers,<sup>8</sup> Price vs. Easton,<sup>9</sup> and Lilly vs. Hays,<sup>10</sup> and the Massachusetts case of Mellen vs. Whipple,<sup>11</sup> to show that, in no cases except those typified by Dutton vs. Poole could a stranger to a contract sue upon it. The English case of Tweddle vs. Atkinson,<sup>12</sup> in which Dutton vs. Poole was overruled, was not decided until 1861, while the New York case of Lawrence vs. Fox was decided in 1859.

No person interested in the law as a science can but regret that Judge Comstock's views did not prevail. Mr. Justice Crompton's remark in Tweddle vs. Atkinson must commend itself. "It would be," he said, "a monstrous proposition to say that a person was a party to the contract for the purpose of suing

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<sup>7</sup> Ventris's Reports, 318, 332.

<sup>8</sup> 1 Strange's Reports, 392.

<sup>9</sup> 4 Barnewall and Adolphus's Reports, 433.

<sup>10</sup> 5 Adolphus and Ellis's Reports, 548.

<sup>11</sup> 1 Gray's Reports, 317.

<sup>12</sup> 1 Best and Smith's Reports, 393.



upon it for his own advantage, and not a party to it for the purpose of being sued." To-day in New York no lawyer can tell with any certainty when a person, not a party to a contract, may not sue upon it. The cases are in hopeless confusion. No principle can be deduced from them. Confusion worse confounded reigns. As proof of this assertion the reader is referred to the recent case of *Buchanan vs. Tilden*.<sup>13</sup>

The first two opinions written by Judge Comstock dealt with mere matters of practice. His third opinion was written in the famous case of *Wynehamer vs. the People*.<sup>14</sup> Its ability astonished the bar. It revealed a great judge and gave him an enduring reputation as one of the greatest judges New York has had.

The case involved the constitutionality of an Act of the Legislature passed April 9th, 1855<sup>15</sup> entitled: "An Act for the Prevention of Intemperance, Pauperism and Crime." The Act as described by Judge Comstock was one of fierce and intolerant proscription. The court held that as to intoxicating liquors owned at the time it took effect, the Act itself, if effectual, would have the result of depriving the owners thereof of their property without due process of law and was, therefore, unconstitutional. As the unconstitutional parts of the Act were not capable of sepa-

<sup>13</sup> 158 New York Reports, 109.

<sup>14</sup> 13 New York Reports, 378.

<sup>15</sup> Laws of 1855, Chapter 231.

ration from the other parts, the whole Act was declared void.

After stating the case, Judge Comstock said that the only question he should consider was the constitutionality of the Act for the alleged violation of which Wynhamer had been indicted and convicted. He quoted the special restraints placed upon the legislative power by the constitution of the state, one of which was that no person should be deprived of life, liberty or property, without due process of law. He pointed to the fact that at the time the law in question was passed intoxicating liquors, to be used as a beverage, were property in just as high a sense as any other possession which a citizen could acquire; as that fact was scarcely contraverted no citation of judicial authorities was needed. The fact that intoxicating liquors were liable to greater abuses than many other articles made property in them no less inviolable than property in such other articles. That they were exceptionally liable to abuse might justify the Legislature in regulating the use of them by their owners but could not justify the Legislature in forbidding all beneficial use of them by their owners. He examined the Act and showed that it was a measure not to regulate the use but to prevent practically all beneficial use of intoxicating liquors. He then repudiated the claim made in argument that a court could declare a law void, though in violation of no constitutional restraint, as against fundamental principles of liberty, as against common reason and

natural rights. Due process of law, he argued, could not mean the very Act of the Legislature which deprived a person of his property, because that would be to do away with all constitutional restraint upon the Legislature. Authorities were then cited to support this position. He next discussed the question what was meant by depriving a person of his property and concluded that the notion of property included not only the right of the owner to use and enjoy it exclusively, but also the absolute power to sell and dispose of it; that the statute in question annihilated the right of sale which made the liquors valuable to their owner and so deprived him of his property and was, therefore, unconstitutional. Judge Comstock next dealt with certain arguments which had been urged in favor of an opposite conclusion. First, he considered the supposed analogy between the Act in question and certain license and excise laws, the constitutionality of which was not questioned. His answer was that they were measures regulating and not prohibiting the use of intoxicating liquors. It had been urged that the Embargo Act, passed by Congress in 1807, had been declared constitutional though it was as destructive of property as was the Act in question. His answer was that the Embargo Act went to the very verge of constitutionality and further that the purpose of the Embargo Act was to protect property while the purpose of the Act in question was to destroy it. He showed that acts in recognition of the common law

right to destroy property to prevent the ravages of fire or pestilence had for their purpose the preservation and not the destruction of property. Of quarantine laws, laws against smuggling, laws against gambling, laws against horse racing, and selling liquors to Indians, for the violation of which property was frequently forfeited, he said that the only resemblance between them and the Act in question was in the *character of the punishment*.

Nothing but a careful examination of the opinion as a whole can give the reader an adequate conception of its power.

The next elaborate opinion of Judge Comstock will be found in the case of *The Mechanics' Bank vs. The New York & New Haven Railroad Co.*<sup>16</sup> The opinion in this case, which will be referred to later, is one of the ablest and most brilliant which Judge Comstock ever wrote and has a special interest in view of his later relation, both on and off the bench, to the litigation which arose out of the vast frauds committed by Schuyler while a director and also president and transfer agent of the New York & New Haven Railroad Company.

The longest of Judge Comstock's opinions is found in the case of *Curtis vs. Leavitt*.<sup>17</sup> The action was brought by Leavitt, as receiver of an insolvent corporation, the North American Trust & Banking Company, to have two mortgages made by the com-

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<sup>16</sup> 13 New York Reports, 599.

<sup>17</sup> 15 New York Reports, 9.

pany to trustees and the bonds secured by them declared void and the property delivered by the trustees to the receiver to be applied by him in payment of the unsecured creditors of the company. The parties to the suit were numerous and the questions decided no less numerous. The mortgages and bonds were held valid and the bill dismissed. The opinion of Judge Comstock is ninety-one pages in length. It furnishes an excellent example of his power of clear and compact statement, discriminating analysis and sustained reasoning.

In *Tracy vs. Talmage*,<sup>18</sup> we have another phase of the litigation arising from the failure of the North American Trust & Banking Company. The State of Indiana had sold to the company \$1,200,000 of its bonds knowing that the company intended to resell them in violation of its charter and had received from the company in payment negotiable certificates of deposit, payable with interest at a future date, which certificates the company had no authority to issue. The State of Indiana presented a claim to the receiver of the company for the bonds so sold. The referees appointed to pass on the claim reported against its validity. Exceptions to the report were overruled at special term and judgment affirming the report entered. The General Term of the Supreme Court reversed this judgment, declared the claim valid, fixed its amount at \$343,437.50, and directed the receiver to pay the same. The receiver

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<sup>18</sup> 14 New York Reports, 162.

then appealed to the Court of Appeals. The appeal was argued in that court in 1855 and reargued in 1856. The judgment was modified by allowing not the balance due on the certificates, nor the price agreed to be paid for the bonds, but the reasonable value of the bonds. Judge Selden wrote the opinion of the court.

The receiver made a motion for a reargument which was denied. The opinion on the motion was written by Judge Comstock.<sup>19</sup> He argued that it was lawful for the State of Indiana to sell its bonds to the company and that the company was competent to buy them for authorized and legitimate purposes. The fact that the company intended to use the bonds purchased for a purpose unlawful, only because not within its corporate powers, and that the State of Indiana had knowledge of such unlawful purpose when it sold them, did not prevent a recovery by the state of the reasonable value of the bonds sold, so long as the state did nothing in furtherance of the company's intention to violate its charter. He admitted that the negotiable certificates of deposit issued by the company to the state were void and unenforcible in its hands, but claimed that the state could disaffirm the contract and recover upon an implied *assumpsit* the reasonable value of the bonds sold and delivered to the company.

Davis vs. New York,<sup>20</sup> was an action in the Su-

<sup>19</sup> Pages 210-218.

<sup>20</sup> 14 New York Reports, 506.

perior Court of New York brought to restrain Jacob Sharp and twenty-nine others from laying down railroad tracks in Broadway, New York City, and to have a certain grant or permission given to them by the City declared illegal and void. The trial was had at Special Term before Mr. Justice Duer and resulted in a judgment enjoining the laying down of the railroad tracks. This judgment was affirmed at General Term and the judgment of the General Term was affirmed by the Court of Appeals. Chief-Justice Denio wrote a long opinion. Judge Comstock wrote a short opinion in which he concurred in holding that the particular ordinance, granting permission to Sharp and his associates to lay the tracks, was void. It is interesting in this connection to note that more than thirty years later, after Jacob Sharp had been convicted of bribing one of the Board of Aldermen of the City of New York, to induce him to vote for an ordinance permitting railroad tracks to be laid in Broadway, Judge Comstock appeared in the Court of Appeals as one of the counsel for the state to sustain the conviction.<sup>21</sup>

In *Smith vs. Brady*,<sup>22</sup> is found a valuable opinion by Judge Comstock in which he discussed the right of a person, who, having agreed to build a building upon the land of another for which he was to be paid when the building was complete, and having substantially failed to perform on his part, sued to

<sup>21</sup> *People vs. Sharp*, 107 New York Reports, 427.

<sup>22</sup> 17 New York Reports, 173.

recover the value of the work performed and materials furnished. He maintained the position that full performance was a condition precedent to the right to recover and repudiated the reasoning of Mr. Justice Joel Parker in the case of Britton vs. Turner,<sup>23</sup> who in such a case would permit the person who had performed labor and furnished materials to recover the reasonable value thereof in an action of *quantum meruit* or *quantum valebat*.

In the action of The New York & New Haven Railroad Company vs. Schuyler, Cross and three hundred and twenty-four others,<sup>24</sup> the Railroad Company sued in the Supreme Court of New York County, Schuyler, its former president and transfer agent in New York City, and three hundred and twenty-five others. Cross, one of the defendants, demurred to the complaint. The demurrer was sustained at Special and General Terms of the Supreme Court, but was afterwards overruled by the Court of Appeals.

The complaint alleged that Schuyler had fraudulently over-issued certificates purporting to represent capital stock of the plaintiff to the extent of \$2,000,000; that these fraudulently over-issued certificates were held by the defendants, other than Schuyler; that some of the holders of such over-issued certificates had sued the company and others were threatening to institute suits; that some of the suits

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<sup>23</sup> 6 New Hampshire Reports, 481.

<sup>24</sup> 17 New York Reports, 592.



were to recover from the plaintiff money paid for such certificates, some to recover money advanced on such certificates as collateral security, and others to compel the plaintiffs to accept a surrender of such over-issued certificates and to issue new certificates in lieu thereof to the holders.

Judge Comstock wrote the opinion of the court. He sustained the bill mainly upon the theory that it would lie to have the over-issued certificates of stock declared void and cancelled because they constituted a cloud upon the title of the holders of the genuine stock of the company. In answer to this position it should suffice to say that there could be no such thing as a cloud upon the title to personal property. A cloud upon title was a doctrine then confined to real property. Again the notion that the spurious certificates could cloud the title of the genuine stockholders to their stock was highly fanciful. They might have the effect of decreasing the market value of the genuine stock; but no holder of an over-issued certificate made any claim to any genuine stock owned by anyone.

The opinion of Judge Comstock in this case appears the least satisfactory of all his published opinions. It is interesting, however, in view of his appearance, after he left the bench, as counsel for the plaintiff in this very action.<sup>25</sup>

Perhaps as well known as any of the opinions of Judge Comstock is that in the case of *Mallory vs.*

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<sup>25</sup> 34 New York Reports, 30.

Gillett.<sup>26</sup> Plaintiff had repaired a canal boat for one Haines and had a lien on it for such repairs to the extent of \$125. The defendant in consideration that the plaintiff would deliver the boat to Haines promised the plaintiff to pay the \$125 due for such repairs. The plaintiff delivered the boat to Haines and sued the defendant to recover the \$125. As defendant's promise was oral, he pleaded the statute of frauds and it was held a good defense.

The statement of the question involved and the analysis of the prior decisions is masterly. Judge Bacon dissented and undertook to show that the question was settled by authority. The case affords an example of the unwillingness of Judge Comstock to be slavishly bound by decisions deemed by him to be erroneous, when a correction of the error would not disturb vested rights.

Another example of the same independence is seen in *Merritt vs. Todd*.<sup>27</sup> One Peck, on May 5th, 1852, had borrowed of Merritt two thousand dollars and had given him a note payable on demand with interest, to the order of the defendant, Todd, who indorsed it for Peck's accommodation. Peck paid the interest for three years and became insolvent. On December 24th, 1855, the plaintiff demanded payment of Peck, which he refused, and notice of such demand and non-payment was given to Todd, the indorser. Judgments at Circuit and General

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<sup>26</sup> 21 New York Reports, 412.

<sup>27</sup> 23 New York Reports, 28.

Term for the defendant were reversed in the Court of Appeals.

In his opinion Judge Comstock said two rules had been applied in such cases. One was that a note payable on demand with interest was a continuing security and that the holder might demand payment of the maker when he chose and that the indorser was liable, if notified of the maker's refusal, to pay with due diligence. The other was that if the holder would sue the indorser he must make demand of payment of the maker "within a reasonable time." The first rule, he said, was the English rule and the one he preferred because it admitted of greater certainty. The Court adopted his suggestion and the decision has ever since been law in New York.

Judge Comstock's knowledge of the law of trusts and powers was profound. In proof of this the reader is referred to his opinions in *Savage vs. Burnham*,<sup>28</sup> and *Downing vs. Marshall*.<sup>29</sup>

We will close this notice of his opinions by referring to his well-known opinion in *Bissell vs. Michigan Southern & Northern Indiana Railroad Companies*.<sup>30</sup> The suit was against two railroad companies to recover damages for a breach of their duty safely to carry the plaintiff, a passenger upon a train of cars which they, by a contract between them, had united in running. The breach of duty

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<sup>28</sup> 17 New York Reports, 561.

<sup>29</sup> 23 New York Reports, 366.

<sup>30</sup> 22 New York Reports, 258.

consisted in the negligence of the defendants in suffering a collision with another train whereby plaintiff's leg was broken.

Two opinions were written: one by Judge Comstock and one by Samuel L. Selden. The opinion of Judge Comstock presents in a very forceful manner the principles upon which corporations acting *ultra vires* are to be held responsible in such cases. He argued that if the directors of a corporation made a contract that was *ultra vires* the directors might be liable to its stockholders, but that the corporation's liability to persons contracting with it was the same as an individual's liability under like circumstances. A contract, he said, might be both *ultra vires* and illegal; but not illegal simply because *ultra vires* and the enforcement of a contract simply *ultra vires*, therefore, would not contravene any public interest or policy. He, therefore, concluded that the roads were liable to the plaintiff in damages for the breach of the contract safely to carry him.

Judge Selden agreed in holding the defendants liable, not for the breach of the contract with plaintiff, but in tort. The greater part of his opinion, however, was given up to controverting Judge Comstock's theory of corporate liability.

When Judge Comstock, at the close of the year 1861, retired from the bench, he immediately resumed the active practice of the law and continued in active practice almost to the time of his death. During this period he was engaged in many important

litigations, but before we take notice of his activity as a practicing lawyer, we would call attention to one further and important public service rendered by him to the State of New York.

We have seen above that the Constitution of 1846 and the legislative acts passed to carry its provisions into effect, effected a radical change in the judiciary system and legal procedure of the state. The Court for the Correction of Errors was abolished. In its place a Court of Appeals was created composed of eight judges, four elected by the electors of the state for the term of eight years, and four selected from the justices of the Supreme Court. These four Supreme Court justices sat but one year and were selected alternately, first, from the first, third, fifth and seventh judicial districts and then from the second, fourth, sixth and eighth judicial districts. It will be seen that the court was not a permanent court. Four of its eight members were necessarily changed every year and, as the term of office of one of the four elected judges ended every two years, it was possible that every two years there might be a change of five in the membership of the court. The justices from the Supreme Court came into the court unaccustomed to the discipline and habits of the court. It took them a whole year to get into working order and then they had to yield to others. The Court was thus constantly shifting and changing and it was impossible to secure uniformity of thought or action. As a result of this method of organiza-

tion the Court was unable to keep pace with its business. In 1867 the Court was so far in arrears with its calendar that an appeal could not be reached for argument until six or seven years after it had been perfected. This amounted, in many cases, to a denial of justice and produced very general dissatisfaction with the system of which it was the result. Another reason for dissatisfaction with the judicial system of the state was found in the division of the state into judicial districts. The state was divided into eight districts. Four justices were elected in each district for the term of eight years and there was in each district a general term. Before 1846 the Supreme Court had been a court of the whole state and had been a unit in fact as well as in name. It now became one court in name but eight courts in fact. The General Terms frequently made conflicting decisions upon the same question and it became almost impossible for a conscientious lawyer to advise his client what the law was on such a question. There was no way of harmonizing these conflicting decisions except by a decision of the Court of Appeals and the long delay in that court necessitated by its over-burdened calendar lent but little encouragement to settling such differences of opinion by appeal to that court. Another reason for loud complaint against the existing judicial system lay in the fact that a judge, either in the General Term of the Supreme Court or in the Court of Appeals, might sit in review of a decision made by himself

or in which he had participated. In the first case decided by the new Court of Appeals,<sup>31</sup> Judge Bronson, wrote an opinion holding that under the Constitution of 1846 it was his duty to take part in the Court of Appeals in the review of a determination in which he, as a justice of the Supreme Court, had participated in the Court below. It was, therefore possible under this system that a judge should decide a case at Special Term, should then sit at General Term of the Supreme Court in review of his own determination and then sit in the Court of Appeals in review of the judgment in which he had participated at General Term.

The dissatisfaction with the judicial system became so great that on March 19th, 1866, the Legislature of New York passed an act making provision for submitting to the people at the general election to be held in November, 1866, the question: "Shall there be a Convention to revise the Constitution and amend the same?" The people voted in favor of a convention and the Legislature of March 29th, 1867,<sup>32</sup> passed an act providing for an election of delegates to meet in convention to revise and amend the Constitution. The delegates chosen met in the Assembly Chamber at the Capitol, in Albany, June 4th, 1867. Besides Judge Comstock, other well-known members were William M. Evarts, George

<sup>31</sup> *Pierce vs. Delamater*, 1 New York Reports, 17.

<sup>32</sup> Laws of 1867, Chapter 194. The first act referred to is *Laws of 1866, Chapter 181*.

W. Curtis, Horace Greeley, Charles Andrews, Charles J. Folger, Sandford E. Church, Edwards Pierrepont and Samuel J. Tilden.

On June 19th, 1867, the President announced the standing committees. Judge Comstock was made a member of two committees, the Committee on the Judiciary and the Committee on the Salt Springs of the state. The latter committee was seven and the former fifteen in number. Charles J. Folger was made chairman of the Judiciary Committee. The other members were, William M. Evarts, George F. Comstock, Joshua M. Van Cott, Charles P. Daly, George Barker, Francis Kernan, Waldo Hutchins, Joseph G. Masten, Theodore W. Dwight, Amasa J. Parker, Charles Andrews, Matthew Hale, Milo Goodrich and Edwards Pierrepont.

On August 30th, 1867, the chairman of the Judiciary Committee, Mr. Folger, submitted to the Convention the report of the committee signed by thirteen of its fifteen members. On September 11th, 1867, Milo Goodrich submitted a minority report signed by himself alone. Judge Comstock signed neither report. His reason for not signing the majority report, as he afterward stated, was the absence of a provision therein which was afterwards adopted. He approved, however, of the Committee's report in all its main particulars and provisions and sustained them, so far as he was able, on the floor of the Convention.<sup>33</sup>

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<sup>33</sup> The consideration of the judiciary article as reported to the Con-



The object of the Judiciary Committee in their work was to overcome the three great objections to the judiciary system stated above. The committee proposed to create a court of appeals to be composed of permanent judges, seven in number, to be elected by the electors of the state and to hold office during good behavior until the age of seventy years. The discussion in Committee of the Whole soon

vention was begun in Committee of the Whole at the evening session of Thursday, November 21st, 1867, and was continued with some interruptions, until the evening of Tuesday, December 19th, 1867, when on motion of the chairman the Committee of the Whole reported the article to the Convention and it was discharged from its further consideration. The next day, December 18th, 1867, the Convention proceeded to the consideration of the report of the Committee on the Judiciary, as amended in the Committee of the Whole. The Convention considered the report on December 18th and 19th, 1867, and then adjourned to January 14th, 1868, at 10 A. M. At the evening session of January 14th, 1868, the Convention resumed the consideration of the article and, on motion of Judge Comstock, referred it to the Committee on the Judiciary for revision. On February 11th, 1868, the chairman, Mr. Folger, from the Committee on the Judiciary, reported to the Convention the article as complete. It was then referred to the Committee on Revision to be printed. Of this committee Judge Comstock had been appointed a member by the President of the Convention on December 5th, 1867. The Committee on Revision reported it to the Convention in the same language in which it was referred to them. As so reported it was considered by the Convention on February 19th, 1868, and after amendment referred back to the Committee on Judiciary with orders to report it to the Convention to be engrossed. On February 20th, 1868, at the evening session, Mr. Folger, from the Judiciary Committee, reported the article on the judiciary as amended complete. A few verbal changes were then made and one section added and as so changed the article was then adopted by the Convention and sent to the engrossing clerk for engrossing. On February 28th, 1867, the Committee on Engrossment reported the amended constitution as engrossed and the same was adopted. On the same day the Convention adjourned *sine die*.

showed that the Convention was averse to the judges holding office during good behavior. Finally a term of fourteen years was adopted and the judges, contrary to the rule now pertaining in some other States, were made eligible to reelection, and it was provided that a judge might hold office till January 1st, after he had reached the age of seventy.

In organizing the Supreme Court the committee, for the purpose of reducing, so far as possible, the opportunity for conflicting decisions by the General Terms of that Court proposed to divide the state into four departments and to have a General Term in each department instead of in each of eight districts as theretofore. They also proposed to have the justices of the Supreme Court elected by departments and not as before by districts. This last suggestion had to be abandoned and election by districts was continued but the General Terms were reduced to four and organized in departments and not in districts. The justices were to be elected for terms of fourteen years, to be eligible to reelection, and it was provided that a justice of the Supreme Court might hold office until January 1st after he had reached the age of seventy years. The Committee met the third great objection by providing that no judge either of the Court of Appeals or of the Supreme Court should sit in review of his own decision or of a decision in which he had participated.

The Convention and subsequently the people adopted all the vital suggestions made by the Ju-

diciary Committee, except as to the tenure of office of the judges of the Court of Appeals.<sup>34</sup>

The hope was entertained, certainly by the friends of Judge Comstock and probably by himself, that he might be nominated and elected the first chief-judge of the new Court of Appeals in the creation of which he had been so instrumental. The hope was doomed to disappointment. Through the influence, it is said, of Samuel J. Tilden, Sanford E. Church was nominated. The nomination was followed by an election and in consequence he became the first chief-judge of the new court.

One of the most important litigations in which Judge Comstock was ever engaged was what was known in New York as "The Omnibus Suit." It appears, as finally reported, under the title, the New York & New Haven Railroad Company vs. Schuyler *et al.*<sup>35</sup>

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<sup>34</sup> The matter of a new judiciary article was first considered by the whole committee at numerous sessions. In the discussion of the Committee, Judge Comstock and the Chairman, Mr. Folger, took a leading part. The scheme finally embodied in the judiciary article was mainly the work of Judge Comstock. When the outline of the system to be prepared had been agreed upon, a sub-committee of which Judge Comstock was chairman was appointed to draft the article. The sub-committee made its report to the full committee and the same was amended in minor details. There can be no question that Judge Comstock was the dominating force in conceiving and formulating the plan of the new judicial system.

<sup>35</sup> A demurrer to the bill for want of jurisdiction after it had been sustained by the lower courts, had been overruled and the bill held good by the Court of Appeals. The opinion overruling the demurrer had been written, as we have seen, *supra*, page 221, had been written by Judge Comstock, 17 New York Reports, 529.

The New York & New Haven Railroad Company had been incorporated by the Legislature of Connecticut in 1844. The Legislature of New York in 1846 had authorized the company to extend its road into New York and clothed it with authority to conduct its business in that state. The capital stock was fixed at \$3,000,000. The par value of each share was made \$100. From the company's organization in 1846 to July 3d, 1854, Robert Schuyler had been the president and transfer agent of the company with offices in New York City. The entire capital stock had been issued and paid for in full. After the entire capital stock had been so issued and paid for Schuyler, as transfer agent, issued what purported to be certificates of capital stock to the extent of \$2,000,000. The over-issue was made either by filling in and issuing new and additional certificates or by reissuing original certificates of stock which had been surrendered for cancellation and not cancelled. These overissued certificates got into the hands of three hundred and twenty-five different persons. Some had bought them in the open market and paid for them the market price and some had loaned money and taken them as collateral to secure the payment of loans. Suits had been brought against the railroad company by some of the holders of these certificates and other suits were threatened by other holders. Some suits were brought in the Supreme Court, some in the Superior Court of the City of New York and some in the

Court of Common Pleas of the City of New York. The purpose of some of the suits was to recover from the company as damages the moneys paid for such certificates, of others to recover as damages the moneys loaned on such certificates as collateral security and the purpose of still others was to compel the company to accept a surrender of the certificates and to issue new certificates therefor to the holders.

Judgment was asked enjoining such defendants as had sued the plaintiff from further prosecuting their suits and the other defendants from instituting suits and declaring the certificates invalid, and directing them to be surrendered for cancellation. The defendants by way of counterclaim sought to recover from the plaintiff as damages the moneys which they had advanced in good faith upon such certificates as collateral or which they had paid as the purchase price for such certificates.

The great effort of the plaintiff was to prevent a recovery on these counterclaims. Judge Comstock argued the case for the plaintiff in the Court of Appeals, but his argument was in vain, though the Court in its opinion said that Judge Comstock had argued the case "with an elaboration and power seldom equaled in a court of justice." The Court held that the defendants who had parted with their money in good faith either as purchasers or lenders could recover from the plaintiff the same with interest.

The decision in this case marks the close in New York of a protracted conflict in which Judge Com-

stock bore a conspicuous part. Thus far the courts of New York had drawn a sharp distinction between negotiable instruments in the true sense, and stock certificates and warehouse receipts. In the last two cases it was held that the assignees of stock certificates and warehouse receipts got no greater rights than the persons had to whom the certificates of stock and warehouse receipts had been originally issued. It was left to this case of *New York & New Haven Railroad Company vs. Schuyler*, to break down this distinction. Since this decision the rights of a holder in good faith and for value of such instrument is no longer limited to the rights of the person to whom the instrument was originally issued.<sup>36</sup>

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<sup>36</sup> The conflict terminated by the decision in this case went back to the *North River Bank vs. Aymar*, 3 Hill 262, a case decided in 1842 by the Supreme Court, then composed of Chief-Justice Nelson and Justices Cowen and Bronson. The Bank sued Aymar and Embury, as executors of Pexcel Fowler, on certain promissory notes signed: "Pexcel Fowler-Jacob D. Fowler, att'y," payable to the order of David Rogers & Son and endorsed by them. Pexcel Fowler by power of attorney had authorized Jacob D. Fowler to make notes for him. The notes were made not in the business of Pexcel Fowler but for the accommodation of David Rogers & Son. The Bank was a *bona fide* owner for value.

Justice Cowen argued that the power of attorney authorized Jacob D. Fowler to make notes only in the business of Pexcel Fowler and that the plaintiff was apprised of such limitation of his authority; but that the attorney, in making notes apparently in conformity with the power, impliedly represented that they were made in the principal's business and the principal was, therefore, estopped to deny that the authority had been pursued. Mr. Justice Bronson concurred in these views.

Chief-Justice Nelson dissented and argued that the attorney's power was limited to making notes in the principal's business and plaintiff knew it; that, therefore, plaintiff must show that the notes were given

One of the most notable legal victories obtained by Judge Comstock was the release on writ of *habeas corpus* of William M. Tweed in the year 1875.

in the principal's business. To the claim that the attorney, by making and putting the notes in circulation, virtually affirmed that they were made in the principal's business and hence within the scope of his authority, he answered that this implied representation was merely an unauthorized declaration by the agent as to the scope of his power which could not enlarge his authority and bind his principal.

The same question came before the Court of Appeals in 1856 in *The Mechanics' Bank vs. The New York & New Haven Railroad Co.*, 13 New York Reports, 599. Robert Schuyler, defendant's transfer agent, issued to Kyle a certificate for eighty-five shares of defendant's stock. Plaintiff discounted Kyle's note for \$12,000 and received this certificate as collateral. Before this certificate was issued no stock had been assigned to Kyle and no outstanding certificate surrendered. Plaintiff sued defendant to recover as damages the par value of the eighty-five shares with interest from the date of loan to Kyle. The judgment for plaintiff at Circuit and the judgment of affirmance at General Term were both reversed by the Court of Appeals.

Judge Comstock, who wrote the opinion, rested the decision upon two grounds: First, that the certificate in Kyle's hands was void and gave him no rights against defendant and, as the certificate was not a negotiable instrument, plaintiff got no greater rights against the defendant than its assignor had; second, that, as Schuyler had issued the certificate without the transfer of any stock to Kyle and without the surrender of any outstanding certificate, he had acted without authority, that plaintiff was chargeable with notice of the limitation of the agent's authority and, as the agent's act was in fact unauthorized, though plaintiff did not know it, it could not recover.

Judge Comstock called attention to the fact that the decision of the Supreme Court in *North River Bank vs. Aymar* had been reversed by the Court for the Correction of Errors, but that the case in that court had never been reported.

The following will display Judge Comstock's reasoning:

"All that can be said in behalf of the plaintiff is, that the certificate itself implied a representation or assurance that it was issued within the power; in other words, that the conditions on which the power depended had been fulfilled. Even this representation, when closely

scanned, was no more than an inference of the dealer that, as the agent had no authority to certify except under conditions, those had been in fact performed. But the conclusive answer is, that the defendant never authorized any such representation. To say that it had, would be simply saying that it authorized the certificate, because the representation was contained in that and existed nowhere else; and this would be assuming the very point in dispute. The representation or assurance, therefore, if such we call it, was the unauthorized act of the agent. Upon this the plaintiff naturally, no doubt, relied. . . . The precise difficulty is, that they relied upon the appearance which the agent gave to the act, and by that they were deceived. They were under no deception as to the power in its real or apparent scope."

Of the doctrine of estoppel he said: "The notion of estoppel . . . deserves, by itself, very little consideration. Every corporate as well as private obligation or instrument undoubtedly contains an express or implied representation of facts, upon the faith of which innocent parties may deal. . . . Where the instrument is not negotiable, the maker may, as I have heretofore observed, be affected by an estoppel *in pais*, if it be transferred upon his representation of its validity, and the dealer acts upon that representation. But to say that he is estopped by the instrument itself, simply because he made it and a third party has dealt with it, is only asserting in another form that fraud, mistake, duress, illegality, want of consideration or want of authority, when the act is one of pretended agency, is no defense. This would subvert the settled maxim that the assignee or purchaser takes subject to all equities between the original parties. It would also subvert another maxim which belongs to the doctrine of estoppel itself. That maxim is, that an admission or representation is no estoppel in favor of a stranger to whom it is not made, and whose conduct it was not expressly designed to influence."

All of the judges concurred with Judge Comstock except Judge Samuel L. Selden, who is stated to have taken no part in the decision.

In *The Farmers & Mechanics' Bank of Kent County, Maryland vs. Butchers & Drovers' Bank*, 16 New York Reports, 125, the Court of Appeals in 1857 was called again to consider this question. Plaintiff sued defendant on five checks drawn upon it by one Green, payable to the order of plaintiff's cashier, and certified as good by defendant's paying teller. They were in fact over-certifications. Plaintiff was a holder for value without notice. A judgment for plaintiff was affirmed by the General Term and the Court of Appeals.



Judge Samuel L. Selden and Chief Judge Denio delivered opinions in favor of affirmance. Judge Comstock dissented.

Judge Selden reasoned thus. Defendant's paying teller had no authority to certify checks without funds of the drawer. By certifying Green's checks he impliedly represented that the defendant had funds to meet the checks. This was, it is true, a false and unauthorized representation. Plaintiff relied upon this false representation supposing it to be true and parted with value in reliance thereon. As the agent's act appeared to be within the agent's authority the plaintiff had the right to rely upon its appearance and the defendant is estopped to deny that its agent's representation was true and that it had funds with which to pay the checks.

"The question," he said, "is not, in such cases, whether the principal is bound by the unauthorized act of the agent, but whether he is estopped, by the representation of the agent, from disputing facts which show that the act was authorized."

The pith of Judge Comstock's dissenting opinion is found in these words: "It should now be observed further, that an agent may clothe his unauthorized acts in the same form as those which are authorized, and still the principal will not be liable. To charge the principal, the acts must be of the same character, not merely in appearance, but in their substance and nature. Thus, an authorized acceptance by an agent upon funds of the drawer is the same in appearance as an unauthorized one for the accommodation of a stranger. In the latter case the false appearance is derived wholly from the false representation of the agent. But as the principal has not authorized the act, so he has not the representation."

Nothing in these opinions was intended to affect the decision in *The Mechanics' Bank vs. The New York & New Haven Railroad Company*, 16 New York Reports, 599, so far as it rested upon the ground that, as the certificate for eighty-five shares issued to Kyle was void in his hands and gave him no rights against the defendant, plaintiff, Kyle's assignee of a non-negotiable instrument, got no greater rights than Kyle. So far, however, as the decision rested upon the ground that the stock certificate was unauthorized and, therefore, could not bind the principal, it was repudiated.

The question came once more before the Court of Appeals in *Griswold vs. Haven*, 25 New York Reports, 595. Wright & Co. kept warehouses for the storage of grain. In 1848 John Wright, a partner in the firm, issued to Ford & Son warehouse certificates for grain. Plaintiff loaned to Ford & Son upon said receipts as collateral. Wright went with Ford to plaintiff, introduced him as a

person having grain in store who wanted an advance upon it and stated, in reply to plaintiff's inquiry, that the grain was in good order and all right. Ford then assigned the receipts and plaintiff made the advance requested. Plaintiff having demanded the grain and the defendant having refused to deliver it sued defendant in an action of trover. A judgment for plaintiff was reversed at General Term. The Court of Appeals reversed and directed judgment for plaintiff. Judge Henry R. Selden, who had succeeded Samuel L. Selden, delivered the opinion of the Court. He argued that while Wright's representation that defendants had in store for Ford & Son the grain called for in the warehouse certificate was false and unauthorized, yet the defendants were estopped to deny that such representation was true and that they did not have such grain in store for Ford & Son. He said: "I have no hesitation, therefore, in holding that, under the circumstances of this case, the defendants were bound by the representatives of Wright—I mean the verbal representatives, and not the representatives contained in the receipts."

In the case of New York & New Haven Railroad Company vs. Schuyler, Judge Noah Davis delivered the opinion of the Court. On the question of privity he wrote as follows: "On the question of privity in any view of this case, I have no difficulty. If the act of the agent can be charged home upon any principle, upon the corporation, then, as was said in the Bank of Kentucky vs. The Schuylkill Bank (1 Pars. Eq. Cas. 180), "the *bona fide* holder of any certificate issued by the transfer agents has a primary and direct claim, either to be admitted as a corporator, or if that is impracticable, from the excessive issue of stock, to be compensated for the fraud practiced upon him." To entitle the aggrieved party to sue, in such case, no privity is necessary, except such as is created by the unlawful act and the consequential injury, because the injured party is not seeking redress upon contract, but purely for the tortious act in the commission of which the contract is an accidental incident.

On the question of estoppel he said: "We . . . with confidence declare the true doctrine of this branch of the law of agency to be, that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself the representative, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."

The reader will also notice that the decision in this case repudiated

On April 27th, 1870, the Legislature of New York passed an act<sup>37</sup> entitled: "An act to make further provision for the government of the county of New York." It took effect immediately. Section four was in these words:

All liabilities against the county of New York, incurred previous to the passage of this act, shall be audited by the mayor, comptroller and present president of the board of supervisors, and the amounts which are found to be due shall be provided for by the issue of revenue bonds of the county of New York, payable during the year eighteen hundred and seventy-one, and the board of supervisors shall include, in the ordinance levying the taxes for the year eighteen hundred and seventy-one, an amount sufficient to pay said bonds, and the interest thereon. Such claims shall be paid by the comptroller to the party or parties entitled to receive the same, upon the certificate of the officers named herein.

A. Oakey Hall was Mayor, Richard B. Connelly, Comptroller, and William M. Tweed, president of the board of supervisors, at the time this act took effect. One James Watson, the county auditor, made up numerous claims against the county of New York, and Hall, Connelly and Tweed, separately, in pretended compliance with the above Act, certified them. The claims so certified slightly exceeded \$6,312,000. The comptroller issued and sold to *bona fide* purchasers the prescribed bonds to that amount, and deposited the proceeds with the Broad-

the only ground for the decision in the *Mechanics' Bank vs. New York & New Haven Railroad Company*, which had not been repudiated in *Farmers & Mechanics' Bank vs. Butchers & Drovers' Bank*.

<sup>37</sup> Laws of 1870, chapter 382.

way Bank to the credit of the city chamberlain as county treasurer. Warrants in favor of the claimants were signed by the comptroller, the mayor and the clerk of the board of supervisors and paid by the bank and charged to the county treasurer's account. These claims were all false, fictitious and fraudulent and the moneys so obtained were divided in great part between Tweed and his confederates.

In October, 1872, an indictment was found against Tweed for neglect of official duty as a member of the board of audit in omitting to examine properly and audit these claims. The offenses alleged in the indictment all took place in 1870. The indictment contained two hundred and twenty counts divided into sets of four counts to a set. Each set of four counts dealt with a separate claim.

Tweed was brought to trial upon this indictment in the New York Oyer and Terminer in January, 1873. Noah Davis, a justice of the Supreme Court, presided. About two weeks was spent in empanelling a jury, after which the trial proceeded at great length. Though Tweed's guilt was established beyond a doubt, the jury disagreed, being nine for acquittal and three for conviction.

On November 5th, 1873, the second trial of Tweed was brought on in the New York Oyer and Terminer, Judge Davis again presiding. Before the trial actually began counsel for the defendant, eight in number, handed to Judge Davis a protest in writing against his presiding at the trial. Among the

counsel who signed this protest were David Dudley Field, the noted law reformer, John Graham, one of the most famous criminal lawyers New York has had, Elihu Root at present Secretary of State in President Roosevelt's cabinet, and Willard Bartlett, now a judge of the New York Court of Appeals. Judge Davis, after consulting with his associates, disregarded the protest and directed the trial to proceed before him, intimating that he would later take steps to vindicate the dignity of the court. After the close of the trial the court fined three of the counsel for the defendant, John Graham, William Fullerton and William O. Bartlett, two hundred and fifty dollars each for contempt of court. Before this proceeding David Dudley Field had sailed for Europe. On learning of the proceeding he published an open letter directed to Judge Davis in which he stated that he would return in the Fall and be in Court before him and challenged him to punish him for contempt. The challenge was never accepted.

On November 19th, 1873, the trial resulted in a verdict of guilty on all the counts except sixteen. Three days later the court sentenced Tweed to be imprisoned in the penitentiary of the City of New York on the fourth count for the term of one year and to pay a fine of two hundred and fifty dollars; on the fifth, sixth, seventh and eighth counts to be imprisoned in the city penitentiary for one year to commence at the termination of the first term of im-

prisonment and to pay a fine of two hundred and fifty dollars in addition, and so on to successive imprisonments for twelve years and to successive fines amounting to twelve thousand five hundred dollars.

Tweed was actually committed to the penitentiary on Blackwell's Island on November 29th, 1873. Having served the first term of one year and paid one fine of two hundred and fifty dollars, upon a petition verified December 14th, 1873, Tweed on December 15th, 1874, obtained from Abraham R. Lawrence, a Justice of the Supreme Court, a writ of *habeas corpus* directed to Joseph L. Liscomb, Warden of the penitentiary of the City of New York.

The fourth ground on which he claimed in his petition that he was unjustly imprisoned was in these words:

That the pretended trial and conviction of your petitioner was for one misdemeanor only, for which no more than one year's imprisonment and a fine of two hundred and fifty dollars could by law be pronounced, and for such misdemeanor and conviction your prisoner has already been imprisoned for more than one year and has also paid the fine of two hundred and fifty dollars.

On December 17th, 1874, the warden produced in court the body of Tweed and filed a return showing the time and cause of imprisonment. To this return Tweed filed an answer. The proceedings were then adjourned to December 22d, 1874, when certain documents were offered in evidence. One was received and the others were rejected as irrelevant and incompetent, and the Court then dismissed

the writ and remanded the prisoner to the penitentiary. On the same day Mr. Justice Lawrence allowed a writ of *certiorari* to the Court of Oyer and Terminer to review the determination of that Court by the General Term of the Supreme Court. The General Term of March 12th, 1875, made a judgment affirming the order of the Court of Oyer and Terminer dismissing the writ and remanding the prisoner. The General Term was composed of Justices Daniels, Westbrook and Donohue. Opinions were written by Justices Daniels and Westbrook.

Section forty-two of the New York *Habeas Corpus* Act declared that no court or officer on the return of any *habeas corpus* or *certiorari* should have power to inquire into the legality or justice of any process, judgment, decree or execution specified in the 22d section. Section twenty-two specified the final judgment of any competent tribunal of criminal jurisdiction.

The General Term held that under these provisions the writ of *habeas corpus* was not the proper method for reviewing the questions sought to be reviewed and that they must be reviewed, if at all, upon writ of error. Tweed then sued out a writ of error to the Court of Appeals.

The argument for Tweed in the Court of Appeals was made by Judge Comstock. The brief, one hundred and thirteen pages in length, has upon every page the impress of his mind. Success required that two propositions be sustained: one, that, if the second

and subsequent sentences were beyond the jurisdiction of the court, the imprisonment of Tweed after the first year was illegal and he had the right to be discharged on the writ of *habeas corpus*; second, that the second and subsequent sentences were beyond the jurisdiction of the court.

The difficulty lay in demonstrating the second rather than the first proposition. The decision of the General Term, as to the scope of the writ of *habeas corpus* in criminal cases, had it been sustained, would have robbed the writ of its efficacy when most needed and have rendered it impotent for the purpose for which it was chiefly devised and needed.

By a discriminating and masterly analysis of the authorities Judge Comstock showed that, with few exceptions explicable by statute or local usage, there were no cases which authorized a court, after a conviction upon an indictment setting forth offenses different in essence and not in mere form, to impose a sentence or sentences in excess of that which the court might inflict for the highest offense upon which conviction had been had.

His argument was a complete success. The writ of *habeas corpus* was granted and Tweed thereby escaped eleven years of imprisonment and the payment of fines aggregating twelve thousand two hundred and fifty dollars. The decision of the court was handed down June 15th, 1875.<sup>38</sup> Two opinions were written; one by Judge William F. Allen and

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<sup>38</sup> 60 New York Reports, 559.



one by Judge Charles A. Rapallo. The judges all concurred.

Judge Allen in his opinion referred to a brief which Charles O'Connor had submitted in another case and quoted from it to support his conclusions. On June 24th, 1875, Mr. Justice Noah Davis, who had tried and sentenced Tweed, wrote to Mr. O'Connor saying:

Considering your relations to the prosecution of Tweed for his frauds and crimes, I cannot help thinking that, although you were not directly or personally connected with that trial, it was your duty as a lawyer and a citizen, if you then entertained the opinion which the court now seeks to attribute to you, to have put into my hands, when the subject was so long under consideration, the argument by which the Court of Appeals endeavors to justify its decision.

Mr. O'Connor had by the advice of the governor been retained in October, 1871, by the attorney-general, to aid in the prosecution of all necessary suits and proceedings in connection with the alleged frauds charged to have been perpetrated upon the treasury of the City and County of New York. This will explain Judge Davis' reference to Mr. O'Connor's relation to the prosecution of Tweed.

Under date of June 30th, 1875, Mr. O'Connor wrote Mr. Justice Davis a long letter in which he spoke with scant courtesy of the Court of Appeals and even insinuated that the judges of that court had been corruptly influenced to their decision.

Judge Comstock, under date of July 22d, 1875, wrote to the editor of the *Tribune*, a letter in which

he expressed the belief that the decision of the Court of Appeals rendered under all the circumstances and surroundings of the case would establish more fully than ever the public confidence in the learning, the independence and the uprightness of that high tribunal. He closed with these words:

Enough has been said, I trust, to show the utter groundlessness of this assault upon that court, and I have little else to say. I have long known Mr. O'Connor, and have long been accustomed to think of him with all the respect which is due to eminent talents and unsullied purity of character. His best friends, among whom I wish to be reckoned, must deeply regret the step he has taken. Most profoundly do I regret it. But I remember that the greatest and best of men have sometimes great faults. If Mr. O'Connor has such, they are only the spots on the shining orb of the sun. If I might venture a word further, I should say: Alas! with all his admirable qualities, he is despotic and intolerant. Woe to the luckless wight who stands in his way! Woe to the Judges who presume to decide against him in a case which he has nursed and upon which he has bestowed his affectionate regard.

If one will only read with care the briefs submitted to the court in this case, he will not need to impute to the judges improper motives to account for their decision. It was the case of pigmies fighting a giant.

On May 6th, 1884, the Legislature passed an act<sup>39</sup> entitled:

An act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof in cities, towns and villages.

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<sup>39</sup> Laws of 1884, chapter 252.

This act took effect immediately. The Broadway Surface Railway Company was shortly afterwards organized under this act and on August 30th, 1884, applied to the Common Council of the City of New York for its consent and permission to construct, maintain, operate and use a street surface railroad for public use in the conveyance of persons and property in cars upon and along the surface of certain streets, including Broadway, in New York City. This consent and permission was given by the Board of Aldermen, which then constituted the Common Council of the City of New York and the local authority whose consent was necessary.

On January 26th, 1886, the Senate of the State of New York adopted a resolution by which its railroad committee was authorized to investigate fully all matters relating to the methods of the Broadway Surface Railway Company or of any other corporation or person or persons relating to or in obtaining such consent, and also to investigate fully the action of the Board of Aldermen of said city which granted or gave the same in respect thereto, or of any member thereof who voted for the same in respect thereto, and said resolution also gave said committee full power and authority to prosecute its investigation in any and all directions in its judgment necessary to a full and complete report to the Senate, as to all matters relating to the granting of said consent and the influences and inducements which lead thereto.

Jacob Sharp was subpoenaed by this committee to

appear before it and give testimony. He appeared in obedience to the subpoena and without objection testified before the committee February 6th, 8th, 9th, and 12th, 1886.

On October 19th, 1886, Jacob Sharp and six others were indicted for giving a bribe on August 30th, 1884, to Leopold A. Fullgraff, a member of the Board of Aldermen, with intent to influence him to vote in favor of granting the consent and permission prayed and applied for. He was brought to trial on said indictment and separately tried May 16th, 1887, at a Court of Oyer and Terminer in New York City before George C. Barrett, a Justice of the Supreme Court. On June 29th, 1887, the jury returned a verdict of guilty. A motion for a new trial and in arrest of judgment was made in July, 1887, and denied. Sharp was then sentenced to four years in State's Prison and to pay a fine of five hundred dollars. The judgment of conviction was affirmed by the General Term and the judgment of conviction and the judgment of affirmance both reversed by the Court of Appeals.

Judge Comstock was retained as one of the counsel by the Government in the Court of Appeals. His argument was confined to the question of the validity of the resolution of the Senate under which the Railroad Committee of the Senate conducted its investigation. He argued that the powers conferred by the resolution of the Senate upon the committee were judicial and not legislative; that the Senate

had no power to create a committee to exercise judicial and not legislative powers; that therefore Sharp was under no compulsion of law to be present before the committee, to take an oath or to testify.

The Court of Appeals was not convinced by this argument, and held that the testimony given by Sharp before the Senate committee was given under compulsion and that the use of such testimony against him on his subsequent trial for bribery was improper. A new trial was granted but never had, as Sharp died shortly afterwards.<sup>40</sup>

By an act passed April 27th, 1865,<sup>41</sup> the Legislature of New York incorporated Cornell University to be located in Ithaca, Tompkins County, New York, as a body politic and corporate. The act provided that the corporation thereby created might *hold* real and personal property to an amount not exceeding 3,000,000 of dollars in the aggregate. The Act appropriated to the corporation so created, the income, revenue and avails to be received from the investment of the proceeds of the sale of the lands, or of the scrip therefor, granted by the act of Congress approved July 2d, 1862.<sup>42</sup> One John Mc-

<sup>40</sup> *People vs. Sharp*, 107 New York Reports, 427.

<sup>41</sup> Laws of 1865, chapter 585.

<sup>42</sup> The act of Congress referred to was entitled: "An act donating the public lands to the several States and Territories which may provide colleges for the benefit of agricultural and the mechanic arts." Congress granted to the State of New York 6,187 pieces of land scrip of 160 acres each, aggregating 988,720 acres. This scrip was to be sold and all moneys derived from the sale to be invested in stock of the United States, or of the States, or some other safe stocks, yielding

Graw died in Ithaca May 4th, 1877, leaving a will dated November 7th, 1876. He first gave certain legacies, among them, one of \$500,000, to his executors in trust for his only child, Jennie, she to have the income annually, and the principal to be paid to her, one-half when she should be forty and the other half when fifty, and she was authorized at any time before the termination of the trust to dispose by her will of the property to be put in this trust. One-half was paid to her at forty. She died before she reached fifty, and, therefore, the other \$250,000 was never paid to her, but went into the residuum of John McGraw's estate. This residuum he gave to Jennie for her use and benefit with full power to sell or otherwise dispose of the same in part or in whole by deed, gift or will. If she should die without child or children or descendants of a child or children and without having made a will, it was his will and desire that whatever property thereby given to her then remained might be distributed between the six children (naming them) of his brother, Joseph, two-sevenths to one, and one-seventh to each of the others named. Honorable Douglas Boardman was appointed executor.

Jennie McGraw was married to Professor Wil-

not less than five per cent. upon the par value of said stocks; the moneys so invested to constitute a perpetual fund, the capital of which was to remain forever undiminished and the interest applied to the endowment, support, and maintenance of at least one college where the leading object should be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agricultural and mechanical arts.

lard Fiske of Cornell University July 14th, 1880, and died without issue September 30th, 1881. Subsequent to the marriage, she executed her will. She gave several pecuniary legacies. She gave \$50,000 to Cornell University in trust to be expended in completing the McGraw Building of said University, \$200,000 to Cornell University in trust to be invested and known as the "McGraw Library Fund" to be applied to the support of the library. The will then contained this provision:

I give, devise and bequeath all the rest, residue and remainder of my property to Cornell University aforesaid, to be added to the "McGraw Library Fund" aforesaid and subject to the trusts prescribed for said fund.

The question as to the right of Cornell University to take these gifts under the will of Jennie McGraw Fiske arose upon the accounting of Douglas Boardman as executor of John McGraw and of Jennie McGraw Fiske. The main argument against the right of Cornell University to take was made in the Court of Appeals by Judge Comstock. He represented the children of Joseph, the brother of John McGraw and submitted to the Court of Appeals a brief 273 pages in length. There were two great points in the case, one of fact and the other of law. The question of fact was whether or not Cornell University on September 30th, 1881, the date of the death of Jennie McGraw Fiske, held real and personal property to an amount exceeding three millions of dollars. The question of law was, if the

University did hold real and personal property to an amount exceeding three millions of dollars in the aggregate, could it take the gift?

The Surrogate found that on September 30th, 1881, the total funds belonging to Cornell University, under Section 5 of its Charter, were \$598,588.65. Judge Comstock riddled the findings of the Surrogate on this point, and convinced the Court of Appeals that Cornell University on that date held property, real and personal, in excess of three million dollars. He also convinced the Court that the University had no right to *take* property in excess of what it could *hold*. The argument made for the University was that there was no limitation in its charter upon the amount of property it could take, that the only limitation was upon the amount it could hold, and that, therefore, it could take the gifts and hold them as against everyone but the state. This position failed to commend itself to the court.<sup>43</sup>

Judge Comstock's last appearance in the Court of Appeals was in the case of *Tilden vs. Green*.<sup>44</sup> He appeared for the appellants, the executors of the estate of Samuel J. Tilden, deceased. After he was retained and before the argument his intellectual powers failed him.

We have spoken of Judge Comstock mainly as a

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<sup>43</sup> 111 New York Reports, 66. The Legislature subsequently removed all restriction upon the amount of property Cornell University may take and hold. See laws of 1882, chapter 147.

<sup>44</sup> 130 New York Reports, 29.



lawyer and judge. He was much more. In religion he was an Episcopalian. He aided in founding St. John's Military School, an important Episcopal educational school, at Manlius, New York. Subsequently, he made to the school a gift of \$40,000, and guided its Board of Trustees from 1870. He was always alive to all educational interests and was largely influential in having Genessee College removed to Syracuse, where it is to-day known by the name of Syracuse University. He made to it liberal gifts of land and money, and served it as a trustee from its beginning to his death. He was deeply interested in the salt industry in the neighborhood of Syracuse, and made large investments in it. Later, when other and more profitable mines were opened in other parts of the country, and rendered the salt industry of Onondaga County unprofitable, he lost heavily through such investments. Through his liberality and unprofitable investments, he was reduced in the later years of his life almost to want. His wife died before him. His only son died in his lifetime, insane. An adopted daughter now dead, alone survived him. His protracted and intense labors in the Cornell University case caused an affection of the heart, which remained with him during life. Later, he suffered a stroke of paralysis. The last few years of his life were filled with suffering, sadness and anxiety. He died, as has been stated, September 27th, 1892. In his death the state of New York lost a worthy citizen, a great lawyer and a distinguished jurist.



JUDAH PHILIP BENJAMIN.



JUDAH PHILIP BENJAMIN

From an enlarged copy of a photograph taken in 1854. The enlarged copy is now the property of Mr. Kruttschnitt of New Orleans.









# JUDAH PHILIP BENJAMIN.

1811-1884.

BY

PIERCE BUTLER,

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THE biography of the mere lawyer, with its bare record of cases won and cases lost, of nice legal points argued and subtle distinctions established, is too apt to prove but dry reading, even if pathos, the humorous or the tragic, be injected from the more dramatic episodes of the criminal courts. Fortunately, few men have had a more rich and varied set of experiences in life than Judah P. Benjamin, whom we may remember as the successful lawyer, but also as the orator, politician, and statesman, filling brilliantly many public offices in America, encountering romantic difficulties and dangers, running a course parallel in time and to a certain extent in kind to that of the other great man of his race, D'Israeli, in England, a "Senator of two Republics," as the late Mr. Vest named him, and we may add, a leader of the bar in two nations.

Born on the Island of St. Thomas,<sup>1</sup> then an Eng-

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<sup>1</sup> St. Croix is often, erroneously, given, but in a letter to his sister, September 29th, 1865, he speaks of "seeing the scenes of my early childhood" in St. Thomas.

lish possession, on August 6th, 1811, Judah Philip Benjamin was under the English law a British subject despite his subsequent sojourn of forty-odd years in America. His parents were English Jews of good family though poor, who had halted at this West Indian island for a few years on their migration to the United States. The father, Philip Benjamin, was of restless disposition, essaying life in various places and in different vocations, and never successful or satisfied anywhere. The mother, Rebecca de Mendes, of a family of Portuguese Jews, was of sterner stuff and more constant mold, the sheet-anchor, it appears, that held the family of seven children from aimless drifting and utter shipwreck until the second child, Judah, could make his way in the world and come to their help. When the boy was about five years old the family drifted to the United States, landing probably at Wilmington, North Carolina, but finally settling at Charleston. Here the struggle for mere existence, according to rumor, was not altogether easy. Being people of education and refinement themselves, his parents meant that their son should have the benefits of education, whatever the sacrifice. Through the kindness of relatives and friends, the children were enabled to get a start, and Judah, with a brother and a sister, was sent to the once famous Academy at Fayetteville, North Carolina, where he lived with an aunt. Ten years ago there was still living one classmate of Judah P. Benjamin (Mr. R. C. Belden, of Spout

Spring), who had vivid memories of those school days, and of the little Jewish boy who surpassed his fellows in class and yet was no bookworm, but full of mischief.

After completing the course at Fayetteville, Judah was ready to enter college. His father managed to find the means at least for a start, and the boy entered Yale College in 1825. His record here was good; he won some small prize "for excellence in scholarship," a Berkeleian prize-book; but his college career was all too brief to allow us to judge whether or not he would have displayed something of the extraordinary mental capacities that marked the man in after life. His father was no longer able to maintain him at college, and the young Benjamin left Yale before the completion of his sophomore year, in 1828. From the suddenness of his departure there later grew the rumor, sprouting amid the host of calumnies concerning public men at the outbreak of the Civil War, that he had been expelled from Yale, and expelled for a dishonorable, petty crime. There is no such record, however, upon the books of the college; and sufficient answer to the slander upon the boy is the life of the man, and the specific denial, with a plain statement of the facts I have given, in a letter<sup>2</sup> to his stanch friend, James A. Bayard, at the time when the story was going the rounds of the press.

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<sup>2</sup> Dated at Montgomery, March 19th, 1861; kindly furnished by Mrs. W. S. Hilles.

His means of support suddenly cut off, Benjamin made his way back to his family, and, too proud to be longer dependent upon them, went to New Orleans, where he and his companion, afterwards a successful man of affairs, are said to have landed almost penniless. Benjamin, a mere boy, was without money and without friends, nothing but his wits to aid him. These wits, however, were uncommonly sharp, and proved ample capital for one who would win his way in the then rapidly growing mistress of the Mississippi. From the first he managed to be, indeed had to be, self-supporting, taking any occupation he could find, but soon becoming a private tutor and clerk in a notarial office, giving the Creoles lessons in English and himself learning French and Spanish, studying law, and falling in love with one of his fair pupils. Benjamin was admitted to the bar on December 16th, 1832; two months later he was married to Mlle. Nathalie St. Martin, a beautiful young French Creole who had been his pupil, and whose social position warrants the assumption that the young lawyer had already found his way into the best society of New Orleans, and that he would have none but the best associates.

For a young man barely of age, just beginning practice at the bar in competition with such tried advocates as those already known and supported by family influence or business relations in a city where he was a penniless stranger, any marriage would have been a serious venture; when we add that his bride

was a fashionable young lady, fond of and used to society, and a devout Catholic, several reflections suggest themselves. In the first place, there is the characteristic self-reliance and courage of the man who will never be daunted by, but will meet and surmount every obstacle, assuming at once the position in the world which he will maintain. In the second place, there is the fact that his wife is a French Catholic, while he is by environment and training English, by birth a Jew. He had certainly been reared in the strict observance of his faith; some circumstances lead us to the conviction that he had probably kept up his connection with that faith during his college days; but with the removal to strange environment and the consequent severing of traditional ties came, apparently, a complete relaxation of the hold of Judaism upon him, so that we seek in vain for any evidence of his continuing the practice of his religion, find not even Jewish names among his associates; and though one of the early minor cases that came to him happens to concern a Jewish client,<sup>3</sup> almost before he can be said to have begun his practice at the bar, he marries a devout Catholic. The limits of the present paper preclude extended comment upon the question of Benjamin's religious views; but really there is little to be said with any degree of authority. On the

<sup>3</sup> Settlement of the estate of the late L. S. Levy, see *New Orleans Argus*, July 1st, 1834; but he already had a case before the Supreme Court, December, 1833.

whole, this marriage is typical; he was practically quite indifferent in religious matters; though always firm in his convictions regarding the fundamentals of religion—belief in immortality and in a personal divinity—and always ready to stand up in defense of his race, he was as ready to participate in family prayers under a Presbyterian as to attend service in an Episcopal church. “It is true that I am a Jew,” he replied to an insolent opponent who had in public speech referred to him as “that Jew from Louisiana,” “and when my ancestors were receiving their Ten Commandments from the immediate hand of Deity, amidst the thunderings and lightnings of Mt. Sinai, the ancestors of my opponent were herding swine in the forests of Great Britain.” But despite this proud and overwhelming retort, so little hold did his religion retain upon him that a New Orleans newspaper could say, when he first became conspicuous in politics (1844), “of Mr. Benjamin’s religious views we know nothing.”<sup>4</sup>

The first years of Mr. Benjamin’s career at the bar in New Orleans are naturally barren of salient incidents; but the early appearance of his name in the Reports of the State Supreme Court, and the very rapid increase of such appearances, would indicate the rapidity with which he was acquiring business and reputation. Contrary to what has been stated

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<sup>4</sup> Louisiana Courier, November 23d, 1844; for discussion of Benjamin’s religious views, see Kohler, Publications American Jewish Historical Society, No. 12.

in other sketches of Mr. Benjamin, it is clearly established to my mind that he began with no partner, self-reliant from the first; for not only is there no certain family record or tradition to sustain the commonly accepted notion that he began in partnership with Thomas Slidell, or C. M. Conrad, or both, but there is the rather conclusive evidence of early directories of New Orleans giving different offices for these men. The association with Mr. Slidell, afterwards on the State Supreme Bench, is, however, undoubted, for out of this association grew Benjamin's first piece of legal writing. He and his friend Slidell had made, for their own convenience, in the leisure moments that are so sure to come to young lawyers, a Digest of the decisions of the Supreme Court. It was used in manuscript by them, the news of it going abroad to other lawyers led to its being much borrowed; until it occurred to them that they might reap some advantage from the vogue it was enjoying. Revised and added to, the manuscript was published in 1834 as a "Digest of the Reported Decisions of the Superior Court of the Territory of Orleans and State of Louisiana." Though modest in its pretensions, assuming to deal with the practical application of the decisions rather than with abstract principles or legal theory, Benjamin and Slidell's "Digest" won immediate recognition as a most useful *vade mecum* for the practicing lawyer, maintained its position for a considerable period as the standard Digest, and enjoyed a second edition, re-

vised and enlarged, in 1840. The plan of the work, and in truth the body of it, was Benjamin's; like everything that he did, this is remarkable for simplicity and lucidity of method and presentation, for that peculiar analytic power and grasp of essentials that even at this early date marked his supremely logical mind, enabling him to sift the most complex questions to the discovery of the real essence which his reader or auditor must be made to apprehend.

His training under Mr. Stringer, the notary in whose office he studied, had taught him precision and the power of concise statement; he formulates his proposition as succinctly as possible, and adduces his citations, with the air of a practiced writer; and this was the habit and method he followed in legal and forensic argument, as will be noted in his later career. In the notary's office, too, he had cultivated the fine penmanship that marked him through life, clear and delicate and beautifully free from errors and corrections. And here too, doubtless, he had enjoyed opportunities of making valuable acquaintances that would return to give him business in his career as a lawyer. No doubt the "Digest" did much to establish his reputation and so to assist him in the winning of business. His success was, even for those days, marvelously rapid; but it should be remembered that, although he was young and a stranger without family influence to help him at a bar where already Roselius, Mazureau, Levi Peirce, and a host of others were established figures, the conditions of



life and society in the New Orleans of the thirties were very favorable to such a beginning as he must make.

The city was growing, in population and in commerce, as it has never grown since; steamboats were multiplying on the great river bearing tribute to the port at its mouth; steamships were beginning, and railways; the agricultural resources of the vast country, still all tributary to New Orleans as much of it has ceased to be since, were being developed; and the quaint old French town that had slept as nothing but a little town under the Spanish and French dominion, was waking, stirring, expanding out of its ancient limits of the rampart and the canal, till it became a thriving commercial city, with a commerce truly astonishing in proportion to its population. And if Benjamin was a newcomer in New Orleans, so were most of his rivals at the bar, strangers from all parts of the Union, and some, like Pierre Soulé and Roselius, from Europe, flocking to participate in the prosperity of the new city.

Where there is much commerce there will be also much litigation. And, whether from preference or because he foresaw that this would be the most promising field, it was to commercial law especially that Benjamin devoted himself. With a wonderful facility in the acquisition of knowledge, and especially a talent for languages, he perfected himself in French and in Spanish, and made himself familiar with the legal system which had prevailed in what

had so recently been French or Spanish territory. Thus equipped, and aided by the faculty, already remarked upon by those who came in contact with him, of accomplishing a prodigious amount of labor, assiduous and painstaking in the preparation of the minutest details of his cases, he gathered a large clientele, and within ten years of beginning practice was not only a recognized leader at the bar but so securely established financially that he could begin to turn his attention to things other than law. "Benjamin is emphatically the *Commercial* Lawyer of our city, and one of the most successful advocates at our bar," writes the author of the first sketch<sup>5</sup> of him, in 1845.

Throughout his career, Mr. Benjamin remained "emphatically the commercial lawyer." Occasional cases in the criminal courts merely serve to emphasize the fact of his preference for the civil practice upon which his great reputation and his considerable fortune rested. And in this practice, covering a period of nearly thirty years in New Orleans with some episodes in California, in Ecuador, and before the Supreme Court, there is but here and there a case concerned with facts or involving principles of permanent interest or importance. There are none involving important principles of constitutional interpretation; when we want to discuss Benjamin's

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<sup>5</sup> Sketches of Life and Character in Louisiana, New Orleans, 1847; anonymous, but known to be by Judge Whitaker, the sketches appearing first in the daily press.

views upon the Federal Constitution we turn from Benjamin, the lawyer to Benjamin, the senator; when we seek his influence upon the law and the constitution of Louisiana, we follow him into the state legislature and the state constitutional conventions. He was a business lawyer, and an eminently successful one, careful to the minutest detail in informing himself upon the facts and the law of his cases, acute in discovering, and resourceful in making use of the flaws in his opponent's case, but especially admirable in his faculty of presenting his own argument with such lucidity and logical force as to carry conviction to the mind of judge or jury. It was his habit to set forth first the essential points that he would establish, frequently in very brief propositions, to whose establishment he would advance with firm and assured tread, with the utmost apparent simplicity but really with very consummate powers of logical reasoning amounting at times to extreme subtlety, until one is brought to the conclusion with the sort of feeling that there should be a Q.E.D. there. He was recognized as consummate master of the art of stating his case; he proceeded on what is, I suppose, conceded to be the wise plan of making out his own case rather than picking flaws in the adversary's; and though this was a power somewhat dangerous, possibly leading to over-confidence, its effect is vouched for in an anecdote concerning the first case in which Benjamin appeared before the United States Supreme Court, when Jeremiah Black was his

adversary: "You had better look to your laurels," said Justice Field to Black as he passed, "for that little Jew from New Orleans has stated your case out of court."<sup>6</sup>

From what has been said in the preceding paragraph it may be seen that an attempt to present anything like a detailed analysis of Benjamin's cases, or even to name them, would be quite beyond the scope of this paper, and indeed quite misleading. There is great display of his learning and acuteness in the matter of Spanish land grants and the like in such cases as *Moore vs. Hampden* or *United States vs. Andreas Castillero* (the New Almaden mine case, for which he got what was in those days the tremendous fee of \$25,000, and in which his brief was filed in the Supreme Court by counsel on appeal at a time when he himself was the "rebel" Secretary of State); but in these as in most of the others the principles will be found of particular rather than of general application or interest. Yet we may mention as of something like national interest the first case that brought his name before the public outside of Louisiana.

The brig "Creole," engaged in the coasting slave trade, shipped a number of slaves at Norfolk and other points for New Orleans. On the high seas nineteen of the slaves mutinied, killed the supercargo and injured others of the officers, terrorized

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<sup>6</sup> Kohler, Publications of the American Jewish Historical Society, No. 12.

crew and passengers, and took the vessel into Nassau. Here the mate jumped into a boat, made his way to shore, and appealed to the American consul for protection for the vessel. The British authorities investigated the affair, and held the actual mutineers for trial. According to the officers of the vessel and some passengers, the British officials then announced to the remaining slaves that they would be free if once on British soil, and permitted them to land. According to the British officials, the stampede of the slaves was due to such an announcement from some person or persons connected with the vessel. In either case, the parties interested in the slaves in New Orleans began suits to recover against the insurance companies in which they held policies assuring them against such loss as had been incurred. Benjamin's brief in these cases, *Lockett vs. Merchants' Insurance Company*, and *McCargo vs. Merchants' Insurance Company*, was a very able and scholarly review of the whole status of slavery under the law of nations and under our own domestic law; and it was printed in pamphlet form and widely circulated. It drew attention to him not only for its own sake, but because the case became for a time a *cause célèbre*, threatening international complications which were adjusted by the treaty with Great Britain in 1842, and leading to a violent anti-slavery attack from Giddings in Congress.

Before this "Creole case," however, Mr. Benjamin was firmly established in a very lucrative practice in

New Orleans, having outstripped many even of those who had been well established when he began. He was already the main support of his mother and sisters, now living at Beaufort, South Carolina, whom he visited in the summer when he did not, as soon came to be his regular habit, go abroad. Feeling secure of his position, he turned his attention to politics. Throwing himself with his customary enthusiasm into an exciting political campaign, he was elected to the State Legislature in 1842 on the Whig ticket; and his enemies said that it was mainly owing to his shrewd advice that his ticket won. Feeling that the growing demand for a more Democratic constitution could not be put off, he advocated the calling of a constitutional convention, and was elected a delegate to that convention in 1844. There was a contest over his seat; a new election resulted in his being again returned. The convention met at Jackson, significantly named, for the Democrats had insisted on this rural refuge from the wiles of the corrupt city; but after a few weeks of futile talk in August, the convention adjourned to meet in New Orleans in January, 1845, under vain protests from a stalwart band of its Democratic members. In the convention Benjamin was one of the most conspicuous and assiduous members. In its long sessions, from January to April, he was almost always present, finding time meanwhile to keep up his practice and to look after the sugar plantation in which he had become interested. His attitude is eminently conservative

and conciliatory, his influence upon the Convention very considerable; when he can not get for New Orleans all that he feels she ought to have in the way of representation in the General Assembly, he is fertile in expedient and suggestion, ready with the practicable compromise. As characteristic of his trend of thought at this time it may be pointed out that he advocated a judiciary appointed for life, a governor who must be a native of the United States, a registration system for voters (there was none, hence much corruption at elections); that he denounced in unmeasured terms the idea of allowing any kind of representation for slaves, whether after the plan of the Federal Constitution or otherwise; and that, in urging his colleagues to forget party differences and unite in the effort to provide for the state a safe bulwark against coming dangers, he predicted that "the time was not far distant when all parties in the South must find themselves united to meet a common danger"—the attack upon the domestic institutions of the South.

Even while this Constitution was making, Benjamin was busy with his investigations and experiments in the cultivation of sugar cane and the manufacture of sugar. He had acquired an interest in a large and fertile plantation, "Bellechasse," in the Parish of Plaquemines, some few miles below New Orleans, and took up with determined energy the experiments then being made especially to increase the percentage of sugar extracted from the juice of

the cane. Under the old system of simply boiling the juice to the point of granulation in large open kettles a very large proportion of molasses, far less valuable than sugar, was produced. The essential idea of the new system, which had several modifications, was that the evaporation of the juice should take place in vacuum. Mr. Benjamin, with customary thoroughness, made himself master of the sugar chemistry just then beginning to develop into a real science. In his trips to France he made it his business to learn the latest theories and inventions of the French sugar chemists, then far in the lead. He made friends with M. Rillieux, the inventor of one of the new processes, had him come to "Bellechasse," and installed there a model refinery which was so wisely planned that the essential parts of the apparatus then set up were in use as late as about 1895, when it was found necessary to build a new sugar house.

Moreover, Mr. Benjamin performed still further useful service for the development of the great sugar industry in Louisiana when he wrote for De Bow's "Commercial Review"<sup>7</sup> a series of articles that presented, for the first time, in admirable popular form, the new theories and methods which were to revolutionize sugar making. He was not, of course, a chemist, nor did he claim to be even a pioneer in the introduction of the new processes into Louisiana (he gives in one article a list of the planta-

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<sup>7</sup> Vol. II, 322-345; vol. V, 44-57; vol. V, 351, 364.



tions where the "vacuum pan" had even then replaced the "open kettle") ; but he was eminently fitted for just the task he undertook, and anyone who will read these interesting articles will find them even now instructive, and can understand what a real debt of gratitude the agricultural interests of the state owe to this clear-headed lawyer who first popularized scientific facts of such supreme utility. He was ever ready to try experiments, and ever on the lookout for new developments in sugar, methods of cultivation as well as of manufacture; and in his last article describes clearly for the use of his fellow planters "Soleil's Saccharometer," the first practical instrument applying the principles of polarization to determine the amount of sugar in a given solution—only the practical sugar maker can thoroughly understand what a revolution in the art followed the use of the polariscope. Among his experiments may be mentioned that of making chemically pure sugar direct from the cane juice; this was, as he admits, only an experimental success; but he takes pleasure in quoting the report of a chemist sent out by the Government to investigate Cuban and Louisiana sugar, to the effect that Messrs. Benjamin and Packwood, of "Bellechasse," gave him a sample of chemically pure sugar, and that to them "must therefore be awarded the merit of having first made from a vegetable juice sugar of absolute chemical purity."

In the midst of this plantation episode occurred several domestic incidents that must be noted. Mr.

Benjamin's wife, devoted to social life, found life on the plantation *triste*. Accordingly, she, with their one child, a daughter, went to France, where they were henceforth to live permanently, visited by Mr. Benjamin in the summers. Having a large house and ample means, and longing for renewed association with the family to whom he was devotedly attached, Mr. Benjamin moved his mother and sisters from South Carolina and installed them at "Bellechasse," building for them a handsome new house which still stands. His mother did not long survive, dying in 1847. The care of the household then devolved upon Mrs. Levy, his elder sister, to whom he was especially devoted and who possessed many of the gifts of her brilliant brother. They entertained a great deal, and led a delightful life so long as it could be kept up. But first came a series of disastrous overflows that ruined the cane; then a note for \$60,000 which Benjamin had indorsed for a friend came upon him; it was no longer possible to maintain so expensive an establishment; the family were moved to a home in New Orleans, or rather in what was then the distant suburb of Carrollton, while Mr. Benjamin kept bachelor quarters with two friends, the Huntington brothers, on Polymnia street, nearer the law offices to which he now had to return with renewed energy to build up his ruined fortune. It was typical of the man that none even of his intimate friends knew till years afterwards what had been the extent of the disaster. He sought help from no

one, but set to work with quiet courage to repair the damage.

His familiarity with Spanish law and land titles had already caused him to be associated as counsel with the United States Commissioners for California lands, in 1847, and in 1848 he had been admitted to practice before the Supreme Court of the United States. Out of the California service came increased reputation and large fees for his services. Upon his return to more active practice in New Orleans, he took as his partner Mr. W. C. Micou, a very able attorney, who remained his partner until his death in 1854. No exact figures are possible, but the newspapers of the time estimated the income of the firm of Benjamin and Micou at something like seventy-five thousand dollars yearly. When Mr. Micou's health began to fail, and his death occurred, Mr. Benjamin went into partnership with Mr. E. A. Bradford and Mr. John Finney, under the name of Benjamin, Bradford, and Finney, the firm continuing under this style until the eve of the Civil War, when Mr. Bradford's ill-health compelled him to retire, and Mr. P. E. Bonford took his place. There was certainly not in New Orleans, nor elsewhere probably, a stronger team than Benjamin and Bradford; for Mr. Bradford was a scholarly New Englander, with a splendid mind, and, as many thought, a more able jury lawyer than Benjamin.

But a few years of practice, renewed with undiminished vigor, were needed to make Mr. Benjamin

once more sure of his resources. He lived rather frugally himself, though fond of pleasures and of good eating; he spent lavishly upon the two families who relied upon him for support. But, once more assured of a sufficient income, he began to turn his attention to politics. He had been a presidential elector on the Whig ticket in 1848. In the early part of 1852 he appeared as a candidate for the state senate. And in the same year he was elected, after an exciting contest, to the senate of the United States. In the summer of the same year, as essentially the Whig leader, he had served in the new constitutional convention which drew up the Constitution of 1852. He was, more than any other one man, the guiding spirit of that convention, which the Whigs engineered to what they thought would be their own benefit. In the opposition press the constitution was spoken of as Benjamin's handiwork. He had boldly changed many of the views held by him in the convention of 1845, and now worked zealously, with relentless purpose, to secure such a constitution as might consolidate the Whig party and retain its power in the state.

In the same year, as if the activities in politics, and at the bar, and on the plantation (which he had not entirely given up), were not enough, he had been one of the foremost organizers of the Jackson Railroad, now the Illinois Central, had helped in the Opelousas Railroad, now part of the Southern Pacific, and had organized the great Tehuantepec

Company, projecting a railway and ultimately a canal to connect the Atlantic and Pacific across the Isthmus of Tehuantepec by a route which, so it is reported in the press of the current year, Mexico herself will develop as an offset to our still inchoate Panama project. Of this last enterprise, suffice it to say that, though for a brief period Benjamin's company did succeed in carrying the mails by steamer and wagon road across the Isthmus and through to California in "twelve days less time than by any other route,"<sup>8</sup> the disturbed political conditions in Mexico prevented any practical realization of the scheme before the Civil War came on and ruined the whole undertaking. But for that, it is quite conceivable that Benjamin's energy would have found a way out of the difficulties that beset his company; for he would never have given up so long as there was hope.

In the senate Benjamin early became noted as one of the readiest and most powerful speakers. With a voice of piercing sweetness, though not strong, yet silvery in timbre and far-reaching, with a rapid and yet clear enunciation, and with a manner of extreme simplicity in delivery, he had long been a chosen popular speaker in his own state. His addresses, whether the more purely academic, or the political, or the legal, were perfect models of style; eschewing the barbaric excess of ornament to which orators of

<sup>8</sup> New Orleans Picayune, November 11th, 19th, and 23d; Delta and other papers, also, 1858.

our older school were somewhat too prone, using few figures of speech but the most apposite, and almost entirely barring the display of erudite quotations and phrases from foreign tongues that would have been so easy for one of his wide culture, he relied upon the exquisite nicety of English diction and the careful logical presentation of his ideas or arguments to produce the impression desired. And the testimony of contemporaries is unanimous to the effectiveness of this style of oratory; while the printed speeches lose the charm that must have come from a magnetic delivery, they still stand the harder test of quiet reading.

He was not only a debater, but also a most active and efficient worker in the senate, and at the same time was carrying on his practice, frequently going from a political argument in the senate to address the Supreme Court as an advocate. The old reporter of the senate, Dennis Murphy, when Senator Vest asked him who had been, in all his years of experience, the best equipped member of the senate, answered unhesitatingly, Judah P. Benjamin, of Louisiana.<sup>9</sup> A disciple of Calhoun, he was a stanch advocate of the Southern views upon the constitution and upon slavery. He was especially the propounder and defender of the theory that the Federal Government owed the South protection for its slaves just as it owed protection for any other species of property. To the definition, extension, and main-

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<sup>9</sup> Philadelphia, Saturday Evening Post, October 3d, 1903.

tenance of this proposition and of the consequent rights and claims of the South he devoted himself, arguing for continuance of the government under the constitution, which, he conceived, gave adequate safeguards for all if honestly and fairly administered. He said, with a clear realization that the bond between the states could not be loosed except by revolution and civil war:<sup>10</sup>

To direct attacks on their rights or their honor (the people of the South) appeal to the guarantees of the Constitution; and when those guarantees shall fail, and not till then, will the injured, outraged South throw her sword into the scale of her rights, and appeal to the God of battles to do her justice. I say her sword, because I am not one of those who believe in the possibility of a peaceful disruption of the Union. It cannot come until every possible means of conciliation have been exhausted; it cannot come until every angry passion shall have been roused; it cannot come until brotherly feeling shall have been converted into deadly hate; and then, sir, with feelings embittered by the consciousness of injustice, or passions high-wrought and inflamed, dreadful will be the internecine war that must ensue.

In his speech on the Kansas question, May 2d, 1856, Benjamin announced his adhesion to the Democratic party, since that great Whig party to which his heart yet clung had gone to hopeless shipwreck as the country neared the great crisis. For examples of his eloquence at its best, we can but refer to this speech, and to that of December 31st, 1860, when he pronounced for his state rather than for the Union—many had been up to this time in doubt as to the

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<sup>10</sup> Speech of May 2d, 1856, Congressional Globe.

position he would assume—and to the farewell of February 4th, 1861, a noble special defense of Louisiana, and of her right to secede, to declare her independence even as the colonies had declared theirs when the form of government grew irksome. Of this last speech it was that Sir George Cornwall Lewis said to Lord Sherbrooke, "Have you read Benjamin's speech? It is better than our Benjamin (D'Israeli) could have done." It was for this, too, with its dramatic close, that the galleries of the senate had to be cleared to check the "uncontrollable cheers."<sup>11</sup>

Having been elected as a Whig, Mr. Benjamin had, in the midst of his term, become a Democrat. There was little hostile criticism at the time, for most men saw that the course he had followed was best for the interests of the state. But when his first term drew to a close, and he stood for reelection, there was a most determined fight against him in the legislature. By the narrowest of margins, however, he was reelected, thus closing a career in politics quite remarkable, for he had never been defeated for any office.

Had he chosen, too, he might have left the law and more active politics for a securer position under the Government. When General Taylor was elected, Benjamin had been mentioned for the post of attorney-general, and doubtless might have had it, had he cared to. President Pierce had offered a seat

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<sup>11</sup> Congressional Globe, 1860-1861, Part I, p. 218.



on the Supreme Bench to both Benjamin and Bradford; but the one preferred the senate chamber, and the other his law practice. The law practice of the firm, indeed, was as large and as lucrative as ever. Under the terms of the partnership, the gross receipts were divided into twelve parts, of which Benjamin and Bradford each took five, and Finney two parts; and Benjamin's salary as senator was put in with the earnings of the firm;<sup>12</sup> but we need not doubt that he contributed his share from fees of cases in which he was personally engaged, for it was in this last year of the firm's existence that he got the fee of \$25,000 from the New Almaden mines case, and he was much more in request for California land-title cases.

In fact, when the volcano finally broke forth with the secession of South Carolina, Benjamin was in California; and so little had he seemed to favor the views of the extreme "fire-eaters" that it was not until some time after his return to take his seat in the senate that the people of his own state were aware of his exact position in the new aspect of affairs. Confident that the Union could not be dissolved without war, and confident that the South was not "equal in resources with the North," facts of which he kept assuring his people, he was yet as confident of the right of his state to secede if she wished to, and threw his weight into the scales in favor of immediate secession, for, as he told the young soldiers of the Wash-

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<sup>12</sup> Notes of conversation with Mrs. Bradford.

ington Artillery in New Orleans in the last public address (February 22d, 1860) he made there, "Much as war is to be deplored, it is not the unmixed evil which many consider it to be."<sup>13</sup>

Upon the organization of the Confederate Government it became apparent that Benjamin, the lawyer, was to make way for Benjamin, the statesman; during the next four years there was to be little for the lawyer to do, and we shall have to follow Mr. Benjamin in his devotion to the Confederate cause. He had, of course, known Mr. Davis when both were in the senate. In fact, a rather notable incident had caused them to be coupled together. Mr. Davis, being in bad health, and very nervous and irascible, had in the course of a debate on a petty matter connected with the department of war, made caustic and insulting comments upon Mr. Benjamin. Restating the facts of the case as he understood them in spite of Mr. Davis's remarks, Mr. Benjamin sat down at his desk and immediately, says the late Ambassador Bayard, wrote a demand to Mr. Davis for an apology or personal satisfaction, which Mr. Bayard delivered. Like the honorable gentleman he was, Mr. Davis, knowing that he had been in the wrong, made a public apology in the senate, and the incident was terminated.<sup>14</sup> They were afterward friendly, but not intimate; now, however, the Sena-

<sup>13</sup> New Orleans Delta, February 24th, 1861.

<sup>14</sup> Manuscript notes of James A. Bayard, kindly furnished by his daughter, Mrs. W. S. Hilles; Congressional Globe, June 8th, 1858.

tor from Louisiana stood out so prominently from the group of men who had ably and eloquently championed the southern cause that his inclusion in the new government was plainly indicated; and once thrown into close relations with any man, Benjamin's talents and personality were sure to win favor. Mr. Davis, in selecting his cabinet, at first followed the traditional policy of including representatives of as many states, leaders of as many factions as possible. Most of the cabinet officers were men untried in executive positions; consequently there were many "misfits," and certainly not the least of these was putting the ablest of the men selected, Mr. Benjamin, in the office of Attorney-General, where there was almost nothing to do.

Beyond giving a few opinions, which was but child's play to him, regarding the interpretation of tariff laws and the like, the Minister of Justice of the belligerent Republic that was never to have a chance really to organize its courts had few official duties to occupy his time. But a few months of association revealed to the President that he had the right man, indeed, though possibly not in the right place. Of fascinating urbanity, rich in learning and experience, fertile in resource, above all willing to perform the proper office of a counsellor—to give shrewd counsel, indeed, but also to be ready, when his opinion was set aside, to carry out just as zealously the policy decided upon—Mr. Benjamin early became the most trusted friend of the President, the

one to whom he most frequently and unreservedly turned for advice in formulating, or practical help in carrying out, a policy, the one to whom extra and semi-official duties were assigned. It has been said that Mr. Davis got into the habit of referring to Benjamin whatever did not inevitably and unequivocally belong to some other officer of the cabinet; in all essentials, this is probably true, for he found Benjamin not only, as we have said, most thoroughly equipped, but also willing to coöperate, whereas such a man as Toombs, for example, with all of his ability and sincerity of devotion to the cause all were seeking to advance, was absolutely impossible as a collaborator—he would fight the fight in his own way or retire in dudgeon to his tent.

In September, 1861, Mr. Benjamin was made acting Secretary of War, continuing to hold also the office of attorney-general for some months. Here there was ample field for his activities, and the improved system of the War Office soon bore witness to his energy and efficiency. But Mr. Davis was his own Minister of War in so far as the larger problems of campaign were concerned. Moreover, despite his other gifts, Mr. Benjamin was not well qualified for this office. He was a civilian, and a lawyer at that, having little knowledge of, and probably less sympathy with, military punctilio; and the fiery southern gentlemen who had taken unto themselves military titles were extremely punctilious, exaggeratedly sensitive about their dignity, and distrustful of politi-

cians; while Mr. Benjamin, with all his politeness, had a most sarcastic tongue, and on occasion would give it rein. The fact that his usefulness as Secretary of War was near an end was indicated by the remark of the chief clerk of the War Office,<sup>15</sup> that "there is no *entente cordiale* between Mr. Benjamin and any of our generals in the field." The climax, or catastrophe, came with two great disasters, for which Mr. Benjamin was not honestly to be blamed and yet was blamed, the loss of Forts Henry and Donelson and of Roanoke Island. The truth was, in both of these cases, that dearth of ammunition and of war materials in general, which the Secretary had labored in vain to overcome, caused the disasters; but the true facts of case could not, for reasons of public policy, be revealed to the Confederate Congressional Committee, which brought in a report severely censuring Benjamin.<sup>16</sup> Mr. Davis, being in a position not only to know the true facts but also to appreciate the value of Benjamin's services, raised him from Secretary of War to Secretary of State.

Thus within a year Mr. Benjamin had held three cabinet positions and had at length found the one for which he was really suited and in which he was to complete his public service. Fresher and more valuable than anything I might say will be this little

<sup>15</sup> J. B. Jones, *A Rebel War Clerk's Diary*, vol. I, 103, January 3d, 1862.

<sup>16</sup> *Official Records of the War of the Rebellion*, Series I, vol. IX, 183 fol.; cf. B. H. Wise, *Life of Henry A. Wise*, pp. 304-315.

comment by the late L. Q. C. Washington, chief clerk of the State Department under Mr. Benjamin:<sup>17</sup> "I was brought into close relation with M. Benjamin, occupied the adjoining room to his, and shared his confidence and friendship to an unusual extent. This enables me not only to estimate him as a public official, but to weigh and appreciate his many personal gifts and admirable qualities. Mr. Benjamin's studies and training especially fitted him for such a position. He had a thorough acquaintance with history, with both the common and civil law, with international law and modern precedents, with the classics, ancient and modern; the French language and general literature; and with the commerce, institutions, and political conditions of foreign states. He was, indeed, a citizen of Louisiana, but yet far more a cosmopolitan. A man of society, his tact in personal intercourse was unfailing, his politeness invariable. In all the trials and anxieties of the great struggle, I never saw his temper ruffled or embittered. His opinions were generally decided but courteously expressed, even when he differed most widely from others. In his most unguarded moments, I cannot recall that he ever uttered an oath or a violent expression. He was ever calm, self-poised, and master of all his resources. His grasp of a subject seemed instantaneous; his mind appeared to move without friction. His thought

<sup>17</sup> Manuscript notes furnished by Mr. Washington to the late Mr. Francis Lawley.

was clear. His style, whether in composition or conversation, was natural, orderly, and perspicuous. I do not affirm that his compositions were wholly unstudied, but, whatever art there was, he had the art to hide. I have known him often to compose a long despatch or state paper with great rapidity, with hardly a word changed or interlined in the whole manuscript."

With this glimpse of personality from one who worked with him and who always remained his friend, we must turn to a brief survey of Mr. Benjamin's diplomacy. Inheriting from his predecessors a policy outlined on the theory that "Cotton is King," a theory adhered to by the Confederate Government almost to the last, Mr. Benjamin strove to make his work on that line of policy as thorough as possible. Departing from it slightly at the first opportunity, he authorized Slidell, Commissioner to France, to offer a handsome subsidy to win the aid of France, and left no stone unturned, no argument untried, to make effective the plea for official recognition of the Confederacy by France or England, which he knew would mean half the victory won for the Confederate cause, and which he confidently expected to bring about. Though he did not succeed in this endeavor, it would be unjust to ascribe the failure to his management of the diplomatic policy.

Even to the casual observer, it should be apparent that the diplomatic fortunes of the Confederacy were most intimately and indeed vitally, dependent upon

the fortunes of war. To one who makes a careful study of the inner history of the relations existing between England and France and the United States during the Civil War, it will be apparent that Mr. Benjamin's very able diplomacy, his strong arguments on the blockade question, and on the advantages of commercial relations with the South directly to England, and his similar pleas with the added offer of a subsidy to France, did have their effect, and would in all probability have had the desired result if the fortunes of war had opportunely befriended the South; if, for example, Lee had been able to make Antietam a real victory and follow it up.<sup>18</sup> Certainly, it would be rash to assume that any other statesman in the south could have made more effective use of the very limited opportunities for diplomatic negotiation and appeal afforded the beleaguered and blockaded Government struggling to establish itself at Richmond. The truth was, as he himself recognized before the war began, that the North was stronger than the South; and with the failure of southern arms went the failure of southern diplomacy, whether or not, as he himself also recognized, too great trust was reposed in the power of "King Cotton."

Before recording certain incidents connected with Mr. Benjamin in the downfall of the Confederate

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<sup>18</sup> Cf. Callahan, *Diplomatic History of the Confederacy*, Bigelow, *France and the Confederate Navy*; and Rhodes, *History of the United States*, vols. III and IV, *passim*; J. L. M. Curry, *Civil Government of the Confederate States*.



Government consequent upon the fall of Richmond, let me note that in these years of service as Secretary of State, he had become more and more the chief adviser of Mr. Davis, the one upon whom the latter relied for counsel and active assistance. The duties of his office, though at times arduous and requiring delicacy of judgment, complete command of varied information, concentration of thought and decision in action, were yet not at all times sufficient to occupy the time of a man capable of accomplishing surprising amounts of labor in a brief time. It was rather in the unending matters of public policy in domestic affairs that Mr. Benjamin came to deal as representative of the administration; and in this work, of formulating, proposing, and defending the Government's policy, corresponding with reluctant or recalcitrant governors of states that were not always submissive, trying to reconcile the public to these policies, and preparing state papers for Congress, Mr. Benjamin worked so diligently that the tradition still lingers of his spending whole days and far into the night, with scarce a pause for meals, at his office. "The President," says Mr. Washington, "was chiefly preoccupied with the conduct of the war, both by predilection and necessity." How much of the general work of the administration, in the way of polemical and political writing, was done by Mr. Benjamin, may best be indicated by a quotation from one of his letters to Mr. Mason,<sup>19</sup> after the war:

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<sup>19</sup> Kindly furnished by Miss Mason, dated February 8th, 1871.

I have . . . a bound copy of the President's Messages to Congress, which you (who were in our secrets) know to have been written by me, as the President was too pressed with other duties to command sufficient time for preparing them himself.

It is not without reason, then, that Mr. Schouler<sup>20</sup> thinks Benjamin, and not Toombs, should be called "the brains of the Confederacy."

Serene and cheerful even in the gloom of disaster, Mr. Benjamin followed the retreat of the wrecked Government from Richmond. It was on this retreat that, at Danville, he was given hospitable shelter by some friends of the late Dr. Hoge, of Richmond, sharing Dr. Hoge's room,<sup>21</sup> and winning this stout Presbyterian's heart by his courtesy, his brilliant conversation, his gentle consideration for the feelings of others, especially when he, unostentatiously and naturally as if it had been a daily habit, joined in the family prayers. It was on this retreat, too, that, as Mr. Burton Harrison relates,<sup>22</sup> the rickety ambulance in which Benjamin, General Cooper, and others, were riding, got stuck fast in a mud hole. Mr. Harrison, rode off to get assistance to pull them out, and as he returned in the darkness he saw the "cheerful gleam of Benjamin's cigar, and heard his silvery voice declaiming Tennyson's Ode on the Death of the Duke of Wellington." He was the life of the party, refusing to be depressed himself or to allow others to be so; and yet he knew that he was a ruined

<sup>20</sup> History of the United States, vol. VI, 89.

<sup>21</sup> Letter from Dr. Hoge to Mr. Lawley.

<sup>22</sup> Century Magazine, November 1883, pp. 130-145.

man, with scarce a hope of saving some little from the wreck of the second fortune he had built up by his own labors, and that he must begin life anew. Near Washington, Georgia, he separated from the President's party, with the understanding that he would make his way through the country to the coast, and thence to Mexico, to rejoin Mr. Davis if the latter should reach the Trans-Mississippi Department and continue the struggle.

After a long and dangerous ride, not without its incidents to test his courage and readiness as well as his endurance, he reached the Florida coast. Here he hired an open boat with two daring fishermen, who agreed to take him to the Bahamas, since he had already learned of Mr. Davis's capture, and had determined to go to England. In the long trip around the Florida coast and then across to the islands, with scanty and rude provisions, exposed to the heat of a tropical sun, barely missing being swamped by waterspouts, and in constant danger of being picked up by a Federal gunboat, the mere physical endurance of this man, who in all his life before had never known physical hardship, almost surpasses belief. In letters<sup>23</sup> to his family in New Orleans he gives most interesting details of this romantic flight, and of its sequel.

Arriving at the Bimini Islands, he chartered a small sloop and set sail for Nassau. The sloop was

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<sup>23</sup> Kindly loaned by Mr. E. B. Kruttschnitt, his nephew. A large part of the subsequent narrative is based upon family letters.

laden with sponge, too tightly packed in her frail hold; when thirty miles from land, the vessel opened at every seam, and foundered so quickly that he and the few members of the crew barely had time to cast themselves into the single boat trailing astern and cut themselves loose. Fortunately, they were picked up some hours later by an English light-house tender, and at last he got to Nassau. The next day he sailed for Havana, and thence to St. Thomas, his native island. He sailed again in a few days for England: the ship caught fire, and barely made the harbor in safety, with her decks nearly burned through. But flood and fire and the dangers of the highway notwithstanding, at last he reached England, in the end of August, safe from the ever-detested Yankees, but with a scanty remnant of his fortune left him, to begin anew in a strange land.

He had managed to save, indeed, about twenty thousand dollars, (most of which was lost within the year by the failure of Overend & Gurney's bank), and thinking that this would maintain his family while he looked about him for a chance to earn a livelihood, he declined pecuniary assistance from such staunch friends as the Bayards, while he set to work to supply immediate needs for himself by writing for the daily papers. Declining offers of other and easier modes of rebuilding his fortune, particularly from friends in France, he said that he would study for the English bar, "nothing else appeals to me so much." The fight for a living, he

realized, would probably be a hard one; but he was undaunted by present or prospective difficulties, smilingly resolute and self-reliant, as he returned to the profession to which he was devoted, and which he resolved he should never quit again for any allurements of politics.

It seemed even to the conservative English mind preposterous that Benjamin, a veteran lawyer at the very front of the profession in his late home, should have to study law. He did, however, actually study law, devouring with characteristic intellectual rapacity the treatises that were indicated as likely to be most helpful, and testifying himself to the positive pleasure which the refreshing of his knowledge gave him, as well as to his surprise that in a few years of devotion to other occupations one could forget so much of the law. In due course, too, he began the prescribed devouring of the dinners in the Temple that then constituted the course of instruction in that ancient training school of barristers, which he describes humorously in a letter to his old friend and partner, Mr. Bradford.<sup>24</sup> He was formally entered at Lincoln's Inn on January 12th, 1866, and after some little reluctance on the part of Sir Charles, afterwards Baron, Pollock, became a pupil in his offices.<sup>25</sup> Sir Charles, who was soon won to lasting friendship, tells us of the surprising readiness

<sup>24</sup> February 21st, 1866; partially printed in H. C. Tompkins' paper on Benjamin, Alabama State Bar Association Reports, 1896.

<sup>25</sup> Fortnightly Review, vol. LXIX, 334-361.

and energy of this law student of fifty-five, who had but recently passed through experiences that would have wrecked, and indeed did wreck, many a younger man, and who now calmly purposed no less than to begin his legal career anew at the bottom of the formal and conservative bar of England. Fortunately, as has been indicated, the farce of subjecting Benjamin to the usual long term of apprenticeship was not acted through; a special rule in his favor allowed him to be called to the bar in June of that same year. After some little difficulty in securing permanent and desirable quarters, he established himself in the chambers he was to occupy during the remainder of his legal career, 4 Lamb Buildings, Temple, and set about the task of building up a practice.

Owing to the essentially different fashion of the English bar, with its lawyers divided into two classes, solicitors and barristers, and owing also to the fact that nearly all of his competitors had the distinct advantage of family connections and influence with solicitors to bring them briefs, the beginning was more difficult than it would have been in America. But Benjamin had the enormous advantage of his great experience and to an extent, of his past reputation, which had followed him to London; he had also some hope, not without foundation, that some of the Liverpool merchants who, through New Orleans connections, had had dealings with the firm of Benjamin, Bradford, and Finney, would remember the senior partner of that firm now that he had migrated to

England and established himself as a British barrister. He chose the Northern Circuit, including Liverpool, for his practice, and as he had anticipated, derived advantage from his Liverpool connections. It thus so developed, as at the beginning of his career in Louisiana, that commercial cases again became his chief reliance.

Mr. Benjamin never forgot, and at the end of his career made touching allusion to, the peculiar generosity with which he was treated by the profession in England; on his first circuit, he said, the justice before whom he held his first brief, wrote him a kindly little note of congratulation and welcome, hoping that this first brief might be "the precursor of many more." Though a stranger and a rival he was treated from the first, as was said at the final dramatic close of his professional life, not only with all consideration and fairness, but "as one of us."<sup>26</sup> And nothing, in my opinion, displays more clearly the noble traditions and the high tone of the English bar, the true warmth of English admiration for great talent and high principle and unconquerable pluck, than the treatment accorded to this expatriated Jewish lawyer who sought refuge after his stormy career in America.

From the first Mr. Benjamin got some business; but it was not for several years sufficient either to occupy him or to furnish him support. He lived in

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<sup>26</sup> Toasts at the Inner Temple banquet, see *London Times*, July 2d, 1883.

the most frugal fashion during these years of trial, compelled even to practice petty economies and to count cab fares, resolutely cutting himself off, as he wrote to his sister in New Orleans, from the fashionable world of society for which his brilliant conversational powers, his eminently social nature, specially fitted him, but for which he could spare neither time nor money. He continued to write articles for the papers, being for a time a regular editorial writer on the *Daily Telegraph*. He devoted himself assiduously to legal studies, and in the letters which he writes home at this time we early find mention of the great text-book of the law of Sale that was to do so much to establish his reputation, and which he humorously warns his sister against perusing, lest it prove fatal. The treatise "On the Law of Sale of Personal Property" appeared in August, 1868. Its value was at once recognized, its success assured. Few treatises upon legal topics have achieved a more immediate and lasting success than "Benjamin on Sales;" it became a classic upon both sides of the Atlantic; it was adduced as an authority in the courts of that land from which Benjamin was an exile and where he was still regarded by not a few as a rebel and a traitor; it was called for as a *vade mecum* by learned judges in the new old land whither he had fled and become naturalized, Baron Martin, it is related,<sup>27</sup> instructing his clerk, "See that I never

<sup>27</sup> London Times, May 9th, 1884; *Daily Telegraph*, February 10th, 1883.



take my seat here without that book beside me."

In the selection of the topic for his book, English critics have remarked, Mr. Benjamin showed his acumen; for it was one both puzzling and little exploited, a maze of the law wherein his powerfully analytic mind followed out the clues with such acuteness and lucidity that the book deservedly takes rank among great juridical productions. It is, of course, in the design and method of such a book that the real test lies; for on the ability to grasp the complexities of a large subject so as to see clearly what is the essential and what the merely occasional, to comprehend fully, in other words, what must be made clear to others, will depend success or failure in the exposition. It had always been remarked upon as one of Benjamin's peculiar gifts, that his mind darted through the mere mass of facts in any case to light upon and illuminate the essential principle or fact, which he would then set forth in the simplest and most lucid terms and proceed to expound, to apply, and to reënforce by drawing upon his rich stores of learning for cases and authorities. He was therefore well prepared for his task, and laid down his book upon lines broad and solid enough to endure, to admit of expansion and addition without the necessity for building a new foundation; and before his death the book was in its third edition.

It was not long after its publication that he began to feel the effects of the enhanced reputation it brought him, though at first there was no pecuniary

return from the book itself. Practice still came more slowly than this eagerly impatient worker wished, but, as he wrote home, more was coming, and "without my book I should be nowhere in the race." What was he impatient at? one may well ask, in view of the fact that within five years of his beginning practice in England his income from fees was upwards of ten thousand dollars, sufficient to meet the demands made upon him for the support of his wife and daughter in Paris. In 1871 (October 15th), he wrote: "I have really turned the corner at last, and . . . my receipts for the last twelve months have exceeded ten thousand dollars." How the sum of these fees had grown, and how much more rapidly it was to grow, may best be learned from his fee-book<sup>28</sup> which gives the earnings from the first to the last year, and which I incorporate as of more than usual interest.

It will be seen from this table that Benjamin's brain, in spite of the strain to which it had been subjected, could yet coin itself into money for the up-building of this third fortune, from which he would leave an ample support for those dependent upon him. There was clearly no falling off in the vigor of this man, now verging on sixty years, and the quiet confidence which he had felt in his own powers when entering on this new career is amply justified.

The sudden leap in the figures after 1871 was due to the official recognition of his attainments by his

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<sup>28</sup> Manuscript of the late Mr. Lawley.

	£.	s.	d.
1867.....	495	12	3
1868.....	703	0	8
1869.....	1074	7	2
1870.....	1480	3	0
1871.....	2100	17	0
1872.....	5623	7	4
1873.....	8934	3	11
1874.....	9861	1	4
1875.....	11316	0	0
1876.....	13812	9	4
1877.....	14741	3	7
1878.....	15742	6	6
1879.....	14632	5	2
1880.....	15972	4	10
1881.....	14632	3	2
1882.....	12789	5	3
Total...	143910	10	6

appointment, first as Queen's Counsel for Lancashire, and shortly afterwards as Queen's Counsel in full standing, with a patent of precedence giving him not merely the coveted privilege of wearing a silk gown when he appeared before the courts, but also the far more substantial privileges of precedence in the courts and the prestige that comes from this recognition of a barrister as standing somewhat above the ordinary members of his always-crowded profession. Benjamin, always markedly reserved, giving rein to his feelings fully to none, perhaps, but his own family, was highly gratified by this signal mark of his

success. He writes <sup>29</sup> to New Orleans a full description of his silk gown and his wig and other paraphernalia, and of the quaint forms and ceremonies to be gone through with, obviously as delighted—"tickled" is the word I would use—as a boy; he sends his photograph in all the splendor of his new costume, with the remark that the family will doubtless exclaim on "how like a monkey brother looks in that hideous wig."

Within a few years more, as may be seen from the fee-book, his income increased so rapidly that he was encouraged to cut off his practice in the lower courts, appearing only for a special fee and in the courts of appeal, before the House of Lords or the Judicial Committee of the Privy Council. His English contemporaries remark that he was peculiarly fitted for this sort of pleading, before a bench of learned judges rather than before a jury; for they thought him not so manifestly supreme as a jury lawyer, while excelling in the art of presenting a logical argument of subtle construction to the judges; and yet one of these very commentators notes that his powers of description were so fine that "he makes you see the very bale of cotton he is describing on the wharf at New Orleans." However this may be, whether from choice or chance, his English practice, like that in America, was largely in courts that tried without juries; and though a wide and varied range of subjects is covered, the practice is again of the same general nature

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<sup>29</sup> August 10th, 1872.

as that in America, what we may term, collectively, commercial. Though he gets into the famous Tichborne case, there is nothing spectacular in his appearance there. And it is only once, in fact, in the Franconia case, that he goes before the criminal courts in a case that was for a time a *cause célèbre*. In a general estimate of the man, it would be misleading to insist upon this or any other exceptional case as if it were typical.

Indeed, the incident that is best remembered, or rather never forgotten, in the English notices of Mr. Benjamin, Q. C., occurred in the rather prosaic, if exceedingly complex and difficult case of the London and County Bank *vs.* Ratcliffe, on May 19th, 1881. The case was on appeal to the House of Lords, and Mr. Benjamin, in his argument for the appellants, entered somewhat at length into the complicated facts of the case, and then, as was his custom, formulated in the most succinct style the propositions of law upon which he relied and which it would be the purpose of his ensuing argument to make good. "On Mr. Benjamin's restating one of his propositions," says Mr. Russell Roberts,<sup>30</sup> one of his Junior Counsel, "in slightly different terms, Lord Chancellor Selborne remarked, 'Nonsense.' The remark was made in an undertone, and was not intended to be heard. It however, reached Mr. Benjamin's ear. . . . With heightened color, he proceeded to tie up his papers. This accomplished, he bowed

<sup>30</sup> Manuscript of the late Mr. Lawley.

gravely to the members of the House, and saying, 'That is my case, My Lords,' he turned and left the House." He could not be induced to return, but accepted a private apology from Lord Selborne. And when the next hearing in the case came on, the Lord Chancellor, like a true English gentleman, made public amends: "I notice Mr. Benjamin's absence, . . . and I fear that it may be attributable to his having taken umbrage at an unfortunate remark which fell from me during his argument, and in which I referred to a proposition he stated as 'nonsense.' I certainly was not justified in applying such a term to anything that fell from Mr. Benjamin, and I wish you to convey to him my regret that I should have used such an expression."

This little incident made a deep impression upon the profession in England, as well it might. Benjamin's readiness to resent an insult even from the Wool Sack was typical of his proud and yet simple dignity. Certainly, to few men does it chance to receive so signal an apology from the august seat of the Lord Chancellor.

It was not long after this that Lord Selborne was to unite heartily with the Bench and Bar of England in bidding farewell to the illustrious advocate who had, in the brief space of sixteen years, "achieved more than most men can hope to achieve in a lifetime." As the result of an accident, a fall from a moving tram-car, in Paris, in 1880, he had sustained injuries from which he never fully recovered, though

he had resumed his practice. At Christmas time in 1882, having gone, as was his rule whenever he had a chance, to spend his holidays with his wife and daughter in the magnificent house he had built for them in the Avenue d'Jéna, Paris, his infirmities so increased upon him, and took such an alarming turn, that his physician absolutely forbade the attempt to resume work, for which this ever active and buoyant nature was eager.

When he announced his intention of retiring from the bar, early in 1883, a flood of letters poured in upon him from his brother barristers, with articles in the leading daily papers and the professional periodicals, expressing kindly regret, urgent appeal to reconsider, with such unanimity and manifest earnestness that, as he wrote his family, he was moved almost to tears by the thought of this unsolicited and unexpected testimony to the esteem in which he was held. Furthermore, the Bench and Bar united in a unique testimonial to this quondam "rebel," giving in his honor a great banquet in the Temple, June 30th, 1883. More than two hundred and fifty of those whom England held highest in public office and rank, from the Lord-Chief-Justice, the Lord-Chancellor, the Attorney-General, down to simple barristers who had known him as an always fair, honorable, and kindly antagonist though a supremely successful one, assembled in the historic hall to do honor, by this spontaneous and unexpected expression of their feelings, to the great American ad-

vocate who had also become a great English advocate. For that alone Judah P. Benjamin would deserve some remembrance in the list of famous lawyers: "For who is the man," said Sir Henry James, the Attorney-General, in proposing the health of their guest, "save this one of whom it can be said that he held conspicuous leadership at the bar of two countries?"

The mere fact of such an assemblage as that at the great farewell banquet is eloquent of the conspicuous fineness of character of Benjamin; for these men were his friends in a land where but few years before, he had none, in a land, too, whose people are not given to violent and indiscriminate enthusiasms, a people who weigh nicely in the balance the character of those whom they honor and trust. His ready courtesy and affability had made friends even of those whom his surpassing talents had enabled him to distance in the race for fame and fortune; but the germ of their respect for him lies, I think, in what Sir Henry James said:

The honor of the English bar was as much cherished and represented by him as by any man who has ever adorned it, and we all feel that if our profession has afforded him hospitality, he has repaid it, amply repaid it, not only by the reputation which his learning has brought to us, but by that which is more important, the honor his conduct has gained for us.

Returning to Paris after thus bidding adieu to the scene of his great and well-deserved triumphs, Mr. Benjamin seemed for a brief season to recuperate.



But the years of unremitting labor had told upon a constitution so sound that, before this time, he had rarely known illness even of the slightest. On May 6th, 1884, he died at his house in Paris. So closed a life that for rich variety of experiences, for its lessons of unflinching courage and steady cheerfulness in the face of disaster, can not easily be paralleled. Simple in his own habits and tastes, he had lavished money upon those dear to him, for he cared for money only to use it so. Fond of the refinements of society, especially of literature, and as he said really by nature indolent, "loving to bask in the sun like a lizard," he had willingly sacrificed his own pleasure and ease for those whom he loved.



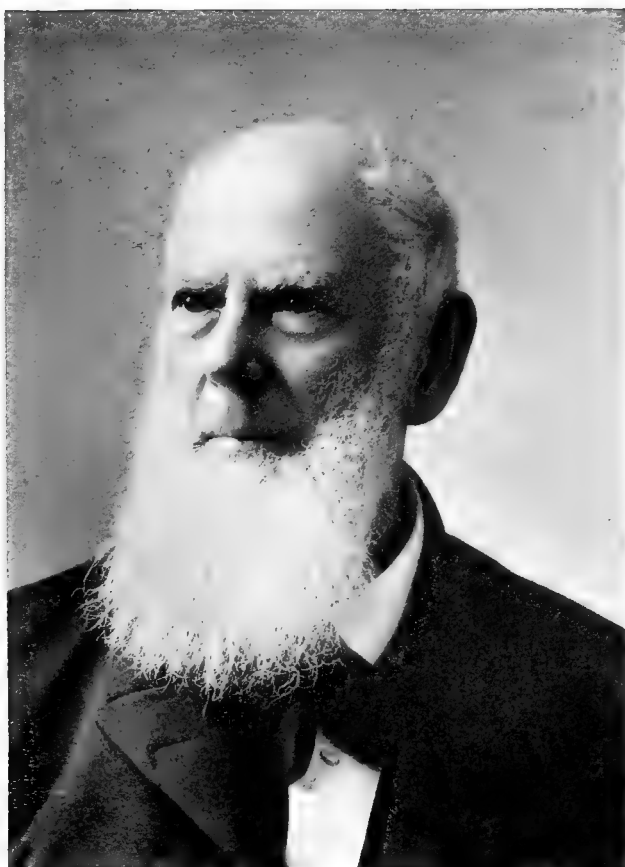
JOHN DEAN CATON.



JOHN DEAN CATON

From a photograph taken in 1893.









# JOHN DEAN CATON.

1812-1895.

BY

MITCHELL DAVIS FOLLANSBEE.

*of the Illinois Bar.*

**A**LTHOUGH John Dean Caton died only twelve years ago, it is, perhaps, not too soon to consider what his opportunities, experiences and characteristics were, and in a measure to estimate the value of his contributions to the legal strength of his adopted state. He conducted the first jury cases ever tried in Cook, Will and Kane counties. For twenty-two years he was on the bench of the Supreme Court of Illinois. When still in middle life he left the bench and became a pioneer business man, as before middle life he had been a pioneer lawyer. He was thus an early example of the practitioner leaving his profession to engage in the business activities for which he had been fitted by hard work, long attention to facts, and legal learning. During his life in Chicago he saw the rough frontier town that had not yet known the luxury of litigation,—a place of plain living and rude entertainment,—develop into the Chicago which planned and achieved the World's Fair. When he came to the

bar, the reports of the Supreme Court of Illinois were contained in one small, bound volume, and a law library consisting of the Revised Statutes was considered ample for the practitioner. He aided greatly in changing this, for through thirty volumes of the reports he gave his impressions of law and justice to the new state, and in a simple, lucid style made his impress upon its jurisprudence. For more than sixty years, indeed, he played a strong part in the work of building up the city and state, and when he died he had gathered a harvest in an honorable professional and business life, and he left behind him not only the memory of being a successful man of sound judgment in practical affairs, but also the memory of intellectual ability and scrupulous integrity.

John Dean Caton was a native of Orange County, New York. His father, Robert Caton, entered the Revolutionary Army from Virginia, but at the close of the war settled on a farm near the Hudson River. When he laid down his arms as a soldier, he became a preacher in the Society of Friends, of which he was a devoted member. His son John, who was born in 1812, was the fifteenth child and the twelfth son. The father died three years later and the family moved to Oneida County, where at the age of five the boy began to attend the district school. Until he was seventeen, he worked on the farm during the spring and summer, attending school in the winter months. Then, after studying for a year at the

Grosvenor High School in Rome, he engaged in teaching, and finally spent a year in the law offices of Beardsley and Madison at Utica.

In 1833 he moved to Chicago, with less than fifteen dollars in his pocket. He came undoubtedly as other men of his time came, full of enthusiasm and with a definite hope of success; but the outlook was not encouraging. He found a settlement of less than two hundred people. The Sac War had occurred only the year before, and although hostilities had ceased between the Whites and the Indians, the surrounding country still contained large numbers of the aborigines. In August of that year, indeed, more than seven thousand, who had come to conclude a treaty with government officials, camped on the lake shore. Materially, the town was but a frontier village. Although it had been surveyed and divided into lots the year before, no streets or sidewalks had been laid out on the low marshy ground. When Caton came, there were a few log houses clustered around Fort Dearborn, a range of sand hills along the lake shore covered with a stunted growth of cedars and willows, and to the south and west an endless stretch of prairie. There was at Wolf Point, where the north and south branches diverge from the main river, a tavern kept by one Wattles. It was a long, two-story shanty, without plaster or paint.

On July 12th, 1834, less than one year after his arrival in town, Caton was elected a justice of the peace by a vote of 182 to 47. In this manner, at the

age of twenty-two, he began his judicial career. He was elected for the Chicago precinct, but his jurisdiction in reality extended over the whole county of Cook. Since the country was law-abiding and almost entirely free from crime, it afforded but little criminal business. The growth of the city was constant, and rumors of its possibilities attracted more and more young men, who came from fine families and excellent homes to share the chance, the excitement and the work. But this activity made little business for the lawyer. The justice presided over more weddings than law suits, and Caton rode on horseback all over the county uniting young hearts. For such a ceremony on the farms he would be paid not more than one silver dollar, even though the journey took a day and compelled him to accept the hospitality of some friend for a night's lodging. The brides were often not more than fourteen years old, while the grooms, as in more cultivated society, varied from twenty to fifty-five. Refreshments at these weddings consisted largely of blackstrap made of molasses and whisky, and often the feast came before the ceremony.

The town had hardly any commercial advantages, although it did have a pier built a year or two before. It was six months before Mr. Caton could secure space for an office, and then he offered Giles Spring, the only other lawyer in town, desk room. This was done with the understanding that when one had a client the other would withdraw by stepping out of

the door into the street. During the summer they had been on opposite sides of the great trial of the year, a case involving the theft of forty-six dollars of Bellows Falls' money. The ten dollars which was Caton's fee in this first case was soon used up, and in the absence of any professional business he was obliged to earn a few dollars here and there, first by posting books for a merchant, then when Spring came, carrying a chain for a surveyor. Caton had earned money by doing odd jobs of this kind in his school days, and was glad of a chance of giving his friend, the surveyor, whose experience in this work was slight, any instruction which he might need. It was while doing this work in an alder swamp northwest of the town that he met his second client. A man had gone to the office of the clerk of the circuit court to bring an action in attachment. He had been told he must get a lawyer to draw up his papers, and that both lawyers were in the swamp helping the surveyor. Consequently he was forced to make his way through the dense thicket in search of an attorney. When at last he came up with the party, Caton went with him back to the office, prepared the papers and procured the writ of attachment. This was the first civil case ever entered in the docket of the Circuit Court of Cook County, and its trial in May, 1834, was before the first petit jury there impaneled.

To be admitted to the bar, he had been obliged to journey on horseback to Greenville in Bond

County, a distance of three hundred miles, through a wilderness of forests and prairie. The time for holding court in Cook County had been fixed as far back as 1831; but as there was no business to be transacted, either civil or criminal, no judge appeared and no court was organized until three years later. Finally a judge came and impaneled a grand jury, which indicted the young man whom Judge Caton had prosecuted for stealing Bellows Falls' money. The attachment case was also tried, with Spring on the other side. Judge Caton had a third case at that term,—a writ of *habeas corpus* directed against the commandant at Fort Dearborn for the release and discharge of a soldier under his control, on the ground that the soldier was under age when he was enlisted and had not received parental consent. This, of course, was a federal case, but the state courts in those days were apt to assume jurisdiction of federal questions. The case was heard and decided in favor of the commandant. Besides this a few other cases were tried. In all of them Spring and Caton were engaged on opposite sides, except the suit against the commandant, in which Thomas Ford, later Judge of the Supreme Court and still later Governor of the state, appeared for the United States.

During this time Judge Caton had attended court at Pekin in Tazewell County and at Hennepin in Putnam County; for in those days men in the west became lawyers by riding the circuit. That was their law school. They had few books, but what books

they had, they knew. They laid hold of Blackstone and of Coke on Littleton. They sought the reasons for the rules, and on this basis applied the law they knew to all the cases which they had. Since there were no law libraries in the county seats, each man had to know the fundamentals and know them thoroughly. As they all lived a simple life in the open and were intent in their work, they learned to think quickly and accurately. But they had to pass through some hardship in attending this rough school. The judges and lawyers rode on horseback with saddledbags. Frequently their trips took them over ten or twenty miles of uninhabited prairies, for as a rule the settlers lived in cabins along the skirts of timber. The cabin of every settler was of necessity an inn. In the democratic fashion of the frontier, while the wife of the house was catching chickens to fry, the judge or lawyer was stabling his horse and making it ready for the night. In these rude hostelryes the evenings were passed in story telling except when the court was in session. Then the trial ran from seven or eight in the morning until nine or ten at night. Before the judge and the attending lawyers reached the county seat, all witnesses and litigants, real or possible, were waiting for them. Unless the season was such that work had to be constant, farmers left their fields, and when the tired horses stopped, the lawyers were surrounded by clients seeking to engage this or that advocate and giving account of cases in which their services were

sought. All these particulars Judge Caton described in an address which he delivered before the Illinois State Bar Association in 1893.

One man, perhaps, wanted a suit defended, another wanted a suit tried, another a suit commenced; and soon everything was bustle and excitement. The lawyers must prepare special pleas in one case, file a demurrer in another, bring a bill in chancery, or prepare an answer in a third, and in another he must make preparations for a trial which might come off immediately. Finally, some poor fellow in jail for horse-stealing or counterfeiting, or perhaps murder, wanted a lawyer to defend him. All this heterogeneous mass of business rushed in upon him in a manner which would have confused any mind not well trained to that mode of practicing law. Not infrequently men called in to take part in a trial when the jury was already being assembled, must learn the case during the trial itself, and with astonishing rapidity seize upon the salient points, methodically arrange them and present them.

On the circuit, Judge Caton met such lawyers as Stephen T. Logan, O. H. Browning and Thomas Ford, who had migrated to Illinois from the South, and Stephen D. Lockwood, Sidney Breese and Elias Kent Kane, who had come from the East. Some of these men had college training, most of them had not; but all were students of law in the same school of practice which Judge Caton attended. Later, and while Caton was still on the circuit, he met Abra-



ham Lincoln, David Davis, Stephen A. Douglas and Lyman Trumbull. Friendships between all of these men were cemented by very frequent intercourse, and severed but slightly by political antagonisms.

These were the days young men ruled the new towns of the middle west. Then, and for many years after, one might go into a large assembly and find no man with gray in his hair, and no man old enough to be bald. The merchant, the professional man, and public officer were, almost without exception, under the age of thirty. They had come from the East and South, strong and hearty, wholesome and fearless, in their love of pioneer life. Looking at their likenesses that have been preserved, one finds faces that indicate courage and determination. If they seem to have lacked a certain serenity and contentment which comes from the acceptance of existing conditions,—a characteristic often observed in the portraits of their English forebears,—on the other hand, they show almost no trace of that constant vigilance and eager ambition which is often met with in the faces of the men of to-day.

It was in this primitive manner, among frontier surroundings, that Judge Caton learned his law. The conditions gave him no chance for an extended knowledge of the historical growth of the English common law. He read Kent and Story, Hoffman and Daniels and what other text books he could find; he read and reread them, compared them,

noting similarities and differences. He did his own work without clerks or assistance. He was, of course, as unfamiliar with digests as with desk telephones, but naturally a man with strong original power, he was able to learn while doing. For instance, he had given but little attention to chancery practice, but being retained in a case, determined to make it his especial study. He read over every case in Johnson's Chancery Cases, every chancery case to be found in the Kentucky reports, as well as in the reports of other states to which he had access. After spending his leisure time in this way for two years, he became very familiar with both the theory and practice of chancery work, and in this branch of law towered above his contemporaries at the bar, so that later when he went to the Supreme Court bench, though only thirty years old, he was famed as a chancery lawyer.

In 1839 when Judge Caton was twenty-seven years old, his health failed somewhat. In the fall before, he had had the misfortune of having two farms, with everything upon them, entirely burned over by prairie fires. He says in his autobiography: "On one was corn enough in a stack to have paid all my debts and more; on the other was hay enough to have wintered a hundred head of cattle." He had difficulty in collecting the fees due him from some important litigation he had managed, and besides this he was affected by the fact that the state was undergoing troubles due to the financial methods

then practiced. The impetus which Chicago received in 1836 by the passage by the Legislature of the Act authorizing the construction of the Illinois and Michigan Canal had been to an extent lost. For these various causes he stopped the constant practice of the law, and went to Plainfield in Will County, where he started a model farm. Even while he was on the farm he kept up his practice more or less, and tried cases here and there as he was summoned. At the same time, he continued to maintain his interest in Chicago affairs, and remained one of the directors of Rush Medical College, a position to which he had been elected in 1837.

In three years Judge Caton had recovered his health, and in the spring of 1842 he moved to Kendall County to try what cases he had there and in adjoining counties. Thomas Ford was the Judge of the Supreme Court assigned to this, the ninth circuit. While Caton was attending at Geneva, in Kane County, Ford received word that he had been chosen by the Democratic State Committee to be the nominee for Governor in place of Colonel Snyder, who had been previously nominated but who died between convention time and the election. Ford suggested that Caton remain in Kane County in order that he might be appointed to fill the vacancy on the Supreme Court bench, which would occur if Ford should be elected Governor. In August, after Ford had been elected by a large ma-

majority, Caton was appointed to serve out the balance of his term as judge.

At the next election, John M. Robinson was elected to the bench in Caton's place, and Caton went to Chicago again to practice law. Judge Robinson started to hold court, was taken ill immediately and died at the end of a fortnight. Thereupon Judge Caton was appointed to fill that vacancy; and since the unexpired term was two years, the new incumbent had a chance to become acquainted with the district, and at the end of the term, when Judge Caton was thirty-two years old, he was unanimously nominated and elected to succeed himself, his opponent being David Davis, later Justice of the Supreme Court of the United States. This new commission, according to the provisions of the Constitution then in force, was for life or during good behavior.

In 1848 Illinois had a new Constitution, which abolished the Supreme Court of nine judges, and made a Supreme Court of three. Judge Caton was elected from the northern district, thus receiving his fourth commission as judge of the Supreme Court. With him were Treat and Trumbull.

In 1855 he was elected again for a term of nine years; during this time he was chief-justice of the Court. He staid on the bench until 1864, when he resigned, five months before the expiration of his term, and was succeeded by Judge Corydon Beckwith. During the first six years, Judge Caton con-

tinued to make the rounds of the familiar circuit, but during the last sixteen years of his incumbency his sole work was as a judge of review. Assigned to him during those twenty-two years were seventeen different judges, some for a short time, and others for long periods. During all that time the greatest personal harmony prevailed among the judges, although there was often difference of opinion.<sup>1</sup>

As a practitioner Judge Caton was known as a man of great strength of character, sound judgment, and most excellent common sense. He never was a skilled pleader or master of stratagem, but he had a plain and rugged way of presenting questions to a jury, which commanded the admiration of men about him. He never became a political judge. In his "Early Bench and Bar of Illinois," which is autobiographical in nature, he says:

During all the time I was on the bench I never made a political speech or attended a political meeting, or in any way discussed political questions in public, or often in private to any considerable extent, and indeed I rarely voted except on special occasions. I never would vote for any candidate simply because he was a nominee of my party, unless I believed him to be as meritorious in every respect as his opponent of the opposite party. I always believed, and still believe, that politics should find no place on the judicial bench, and that, I have always feared, would be the great danger of making the judiciary elective.

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<sup>1</sup> Among his associates were James Semple, Richard M. Young, James Shields, Jesse B. Thomas, William Wilson, Samuel D. Lockwood, Thomas C. Browne, Walter B. Scates, Samuel H. Treat, Gustavus P. Koerner, Norman H. Purple, William A. Denning, Lyman Trumbull, Otis C. Skinner and Pinckney H. Walker.

During this time he handled many cases, since the volume of work demanded of judges of the Supreme Court of the state was considerable. From the December term, 1844, to the December term, 1853, Judge Caton handed down two hundred and three opinions. During that same period he dissented nine times, and gave four separate opinions.

The work of the judges was done in the conference room. In chambers the judges were social rather than formal. As soon as a case was submitted they considered it, without the aid of written briefs and printed abstracts, and with only the notes they had taken at the times of the oral arguments before them. After discussing the case, they assigned the record to some member of the bench to write an opinion. When the opinion was read in conference, they might discuss the case again and revise the opinion. In 1855, however, printed abstracts were required, and in 1856 printed briefs. This simplified the work of the judges,—a necessary reform in view of the increasing business caused by the growing population of the state.

When he became chief-justice in 1855, Judge Caton introduced the practice of keeping a note book in the conference room, in which he set down the names of the cases, the points involved, and the decision which the judges had made on each point. When the opinion was read it could thus be easily ascertained whether it corresponded with the previous agreement among the members of the court.

In the third volume of Scammon's Reports, we find his first opinion, which was a dissent from the opinion of the Court delivered by Judge Douglas.<sup>2</sup> The question involved was, whether in the absence of explanatory evidence, a third party signing his name at the back of the note should be held as an indorser or a guarantor. Douglas had heard the case on circuit, and it was assigned to him to write an opinion. He brought it in earlier than Judge Caton had expected, and therefore, when it was delivered, the latter dissented orally. Later, at the request of members of the bar, he wrote out his dissenting opinion and placed it upon the records. His reasoning was not based on the authorities, but rather on his idea of what should be the proper rule. In his argument he showed that although he was a clear and original thinker, he lacked that scientific knowledge of the principles of the law that a scholar of to-day would possess. The dissenting opinion has never been the law of Illinois, nor in fact the law in other jurisdictions. Judge Caton was simply wrong, but there never was any one more ready than he to acknowledge that fact when the fact was brought to him.

His next opinion was delivered in the case of *Balance vs. Underhill*,<sup>3</sup> which had been assigned to him before the decision of the case just referred to. He tells the story of it in his *Life*:

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<sup>2</sup> *Camden vs. McKoy*, 3 Scammon's Reports, 437.

<sup>3</sup> 3 Scammon's Reports, 453.

I had been upon the bench about a month, and Chief-Justice Wilson had distributed the records to other members of the court, till I thought he considered me so much of a boy that he deemed it not wise to give me any record on which I should write an opinion. Finally, the case of Ballance vs. Underhill having been argued, was taken up in the conference room. The Chief-Justice called for opinions from each one, but no one was prepared to express an opinion without further consideration, and I did the same, although I had pretty distinct views about the case. The Chief-Justice then offered the record for more careful examination to each member of the court in succession, but each made some excuse for not taking it, till he came to me, when he laid it on my desk and said: "Here, Caton, this is a good case for you to break in on." The record was a large one, and the rules then required neither abstract nor brief, but only the record as it came from the Circuit Court was filed. I took the record without demurrer or remark. When I got to my room I pitched into it as a hungry man would into a Christmas dinner. I first read it all through carefully, and then made a full abstract of it.

I then fully digested it, and carefully set down the several points which it presented, both of law and fact. I then re-examined the facts and set down my conclusions upon each one. I then took the points of law which arose in the case, upon which I thought I knew what the law was, but to be sure, I went to the library, and made up a brief. I then stated my conclusions with the authorities in support of them. I then wrote out the opinion as it now appears in the report, but before I presented it in conference, I asked Governor Ford to my room and read it to him, and asked his criticism upon it. Although he decided it in the court below and my opinion reversed his decision, he approved the opinion and highly complimented it. The only point upon which I reversed the decree below, was that he had granted affirmative relief to the defendant without a cross-bill, the error of which he readily appreciated. All of this took me at least a week.



When I read the opinion in the conference room, all readily agreed to it except upon the very point on which I reversed it, on which point all at first disagreed with me, really because all had been in the habit of granting such relief without a cross-bill, on their circuits. Judge Breese was particularly strenuous, and cited a clause in the statute which authorized the defendant to put interrogatories for the complainant to answer, at the close of his answer to the bill. I fought it out right on that line, brought in the books, and showed the reasons which governed the use of every part of chancery pleadings, and finally obtained the approval of all the members of the court, and I have no doubt that this rule has ever since prevailed in this state, and probably there are very few now living that have any suspicion that any other rule ever prevailed here, even on the circuit.

That case really showed the grasp that he had on chancery practice. The rule that a defendant in a suit at chancery could not be decreed affirmative relief upon statements made in his answer, but that he must file a cross-bill to entitle him to such relief, has since been the Illinois rule as it was laid down in Johnson's Chancery Reports, with which Judge Caton, was, as we have seen, thoroughly familiar. His was the work of transplanting an old practice into a new state, and because his study had been of chancery questions rather than questions of banking law, his opinion in the second case is abler than in the first.

The third case in which he wrote an opinion was that of *Burnap vs. Dennis*.<sup>4</sup> There he laid down certain fundamental propositions; namely, that an

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<sup>4</sup> 3 Scammon's Reports, 478.

executor should not be made personally liable for costs; that each count in a declaration must be considered by itself, and stand or fall on its own facts; that an administrator has no authority to sell the personal property of his intestate at private sale,—rules all familiar to us now, but not previously laid down in Illinois cases. Questions involving these points had not, indeed, been decided previously in Illinois, and Judge Caton's opinion cites no decisions from other jurisdictions.

His fourth case was *Schlencker vs. Risley*.<sup>5</sup> This case, which was an action for false imprisonment, had been tried at circuit before Judge William Wilson and a jury, and a judgment for three hundred and thirty-three dollars damages entered. Two of the defendants were a justice of the peace and a constable. Schlencker, who was convicted, justified as one of a posse, acting in aid of Wallace, the constable. On the trial the officers tried to prove their respective offices by general reputation, but the court refused the evidence, except in mitigation of damages.

In discussing this question, the Supreme Court, through Mr. Justice Caton, laid down the following rule, which has since been adhered to:

When an officer justifies an act complained of, purporting to be done in his official capacity, it is necessary that he should aver and prove, in his defense, not only that he was an acting officer, but that he was an officer in truth and right, duly commissioned

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<sup>5</sup> 3 Scammon's Reports, 483.

and qualified to act as such; while, as to all others, it is sufficient for them to aver and prove that he was acting as such officer, and the reason of the rule is, that the officer himself is bound to know whether he is legally an officer, and if he attempts to exercise the duties of an officer, without authority, he acts at his peril; whereas it is sufficient, so far as the rights of third persons or the public are concerned, that the officer is acting in his official capacity, and under color of title; for it would be unreasonable and oppressive, to compel them, before they put faith in his official acts, to go into a minute examination of all of the evidence of his title to the office, and see that he has complied with all the necessary forms of law.<sup>6</sup>

Abraham Lincoln represented the appellee. His argument on appeal was that, "If there is error in this case, it is *damnum absque injuria*. Justice has acquitted herself."

Judge Caton, in reference to a new trial of this case, upon the discovery of material evidence, discovered subsequent to the trial, said: <sup>7</sup>

The law intends that every one shall have a fair trial; and if by any misfortune or accident, without any fault on his part, a party has been unable to present the merits of his case before the jury, as a general rule, the court will allow him another hearing upon such terms as may be deemed equitable.

The case is one of the early landmarks, and is particularly instructive as to the rules governing new trials when newly-discovered evidence is urged as a ground therefor.

In *Lane vs. Sharpe*, <sup>8</sup> Judge Caton laid down the

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<sup>6</sup> 3 Scammon's Reports, p. 485.

<sup>7</sup> 3 Scammon's Reports, p. 486.

<sup>8</sup> 3 Scammon's Reports, 566.

rule for Illinois that parol evidence was inadmissible to vary a contract under seal.

Counsel argued all of these cases, even though they usually involved small amounts, as carefully as possible with their limited libraries and fragmentary education. The lawyers were so few in number that the roll of attorneys was printed on one or two pages of the reports. The fact that they came from different parts of the country was clearly shown in the authorities with which they were familiar. Stephen T. Logan from Kentucky quoted largely from *Pertle's Digest*. When Mr. Butterfield, who had practiced law for some years in New York courts, opposed him and failed to find an answer to a case cited in the digest, he would ridicule the pretension that there was any law in the South. "Why," said he, "this *Pertle's Digest* may be good law south of the Ohio River, but whenever it gets north of that stream it would be taken up and impounded as an estray; but no man except a Kentuckian would ever come and claim the property and pay charges." Illinois had itself at this time only three volumes of reports, and other western states were likewise little advanced in the accumulation of decisions. So through these early volumes cases were decided citing Kent and Chitty, Coke and Stephen, not forgetting Comyn's *Digest*, and Blackstone.

At this same term it was decided that a promissory note payable when William Henry Harrison should be elected president of the United States was valid,

and that an action could be maintained thereon upon averring and proving that the contingent event mentioned in the note had happened. In a second case it was held that an act then recently passed by the Legislature to prohibit betting on elections, applied only to elections held in Illinois and did not extend to those made concerning elections to be held in other states. In a third case at the same term, the question for the court to decide was, whether the fact that the consideration of a note between the maker and the payee,—being a wager on the result of the presidential election,—was a defense to an action upon the note in the hands of an innocent payee. In those days, apparently, betting was as respectable in Illinois as it had been in England when the English cases covering this subject were decided.

In the next volume of reports, we find that most of the chancery cases are assigned to Judge Caton. In deciding these he quotes Story's Equity Pleading, Paige's and Johnson's Reports, always making a very careful summary of the facts. In *Doyle vs. Teas*,<sup>9</sup> he wrote with great care an opinion which, with the facts, covered sixty-six pages. The case had been argued and submitted and considered at conference at several sessions, and Judge Caton was requested by the chief-justice, with the approval of all the other members of the court, to take the record and write an opinion during the vacation. He discovered, he says, that Kent and Story had laid down

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<sup>9</sup> 4 Scammon's Reports, 202.

radically different rules to govern the question of notice under precisely the same circumstances, and after reviewing a large number of decisions, both in England and America, he found it impossible to deduce any satisfactory rule from them. Thereupon he formulated a rule of his own, although he felt that it might be as difficult in its application to particular cases as those which had been laid down by others. In that case he followed *DeWolf vs. Long*,<sup>10</sup> holding that to keep a tender good in chancery, the money must be brought into court. *Doyle vs. Teas* was a bill for specific performance, and Judge Caton said the money should have been brought into court to the clerk. He followed that opinion in the later case of *Wright vs. M'Neely*,<sup>11</sup> but finally in *Webster vs. French*,<sup>12</sup> he wrote an opinion that what he had said in the other cases had been *obiter*, and that "it is time enough for the party to bring the purchase money into court when he is called upon to do so." The last case decided a great many different points, has been quoted freely, and has, in the main, been upheld by later decisions.

This case of *Webster vs. French* was an interesting one. It was a bill filed for a specific performance of a contract for the sale of the Quincy House which belonged to the state. An act of the Legislature had

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<sup>10</sup> 7 Illinois Reports, 679.

<sup>11</sup> 11 Illinois Reports, 241.

<sup>12</sup> 11 Illinois Reports, 254.

directed the Governor to advertise the Quincy House for sale and to receive sealed proposals for it up to the first day of July then next, and to accept the bid of the highest responsible bidder and as governor execute a deed to the purchaser. The bids ranged in amount from \$15,250 to \$21,100. There was also a proposition from another bidder to pay \$500 more than any bid made, and finally one from the firm of Ash and Diller to pay \$601 "over and above the highest bid of the highest responsible bidder for said house and property, made according to the advertisement," etc. To the highest bid, the Governor added the \$500 bid by Henry Root and Company, and to this aggregate the sum of \$601 offered by Ash and Diller, thus awarding to the latter the property at a total of \$22,201. The bidder of the highest specific amount filed a bill in which he maintained that the bid that took the property was illegal and that the Governor had usurped judicial function in deciding who were responsible bidders. The main question considered in the case was, whether the bid was legal or not, and in approaching the question the court was aided but little by former decisions as to what rules of law should govern biddings by sealed proposals. As Judge Caton says, no cases were found bearing at all upon the question except the English case of *Williams vs. Steward*,<sup>13</sup> where Lord Eldon, in a mere dictum said, that bids something like these were accepted in the

<sup>13</sup> 3 Merrivale's Reports, 472.

north of England, where they were called *candlestick bidding*, and were considered good. It may be supposed that the peculiar name came from the fact that the written proposals were placed under candlesticks standing on the table before the commissioners receiving them.

In view of the absence of authority, the case had therefore to be discussed and decided on general principles. The court held, Judge Caton writing the opinion, that sales by sealed proposals are but another mode of sales by auction, and that the same mode of fair dealing and justice is required to govern their conduct as is required in the conduct of auction sales where the bids are open and public. To secure this, the rules for receiving the bids in the latter must be exactly reversed in the former. Where open bids are received, every bidder has a right to know what other bids are made against him, so that he may govern his offer if he chooses by the judgment of his competitors; and for the seller to receive a secret bid or one not known to the other bidders, is a fraud upon them, for which the law will afford adequate remedy. On the other hand, at auctions by sealed proposals, the policy is that each bidder act upon his own judgment, or at least independently of the judgments of any other bidder, and if the seller should, before the bidding is closed, make known the bid of one bidder to another, that would be a fraud upon the bidder whose offer was refused.



Stephen T. Logan, M. Brayman, Abraham Lincoln and his partner, and later his biographer, William E. Heardon, were all of counsel for the winning party. Lincoln's brief starts out in this manner: "It is a gambling business—a stock-jobbing transaction—an evasion of the law and a total subversion of the manifest intention of the Legislature."

Another important case was that of *People vs. Thurber*.<sup>14</sup> Judge Caton says that beyond comparison the most difficult task he ever assumed at the request of his associates was to write an opinion reversing the judgment in this case; but he adds, "it just had to be done." It would have been a very easy task to write an opinion affirming the judgment, but that would have entailed a public calamity which could not be thought of for a moment. It was one of those cases where consequences had to be taken into consideration and given an absolutely controlling influence, and his duty, he says, was to hunt up "shreds and scraps of statutes to sustain the decision," relying "as little as possible upon the consequences of an affirmance, which after all constituted the controlling consideration." If the court had affirmed the judgment, the operation of all *election laws* of the state would have been suspended until a new statute could be passed to cure an omission in the existing statutes. Judge Caton tells the story as follows:

In obedience to the constitution of 1848, the first General

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<sup>14</sup> 13 Illinois Reports, 554.

Assembly, which assembled under that constitution, passed a law abolishing the Court of County Commissioners and the office of clerk of that court, and creating a County Court with a clerk, and conferring upon it judicial powers which had never been exercised by the County Commissioners' Court, as well as the powers which had previously existed in the County Commissioners' Court, and of course it followed that the clerk of the new court would exercise the powers devolving upon him in relation to the jurisdiction conferred upon the court; but the previous laws had required the clerk of the County Commissioners' Court to perform many *ex officio* duties in the execution of many other general laws which had no connection whatever with the jurisdiction of that court; and without the performance of these duties by some one authorized by law to perform them, their operation must be absolutely suspended, and yet the Legislature had omitted to pass any statute devolving these duties upon the clerk of the new County Court, or upon any other person or officer, and my task was to find some authority for holding that these *ex officio* duties had been lawfully exercised by the clerk of the County Court. I repeat that this had to be done or else the wheels of government, to a vital extent at least, must be suspended.

I ransacked the statutes thoroughly, and found in different acts many provisions and expressions which showed clearly that the Legislature supposed and believes that existing laws authorized the clerk of the new court to perform all of these *ex officio* duties which had been imposed upon the clerk of the old court, but that was all. From these expressions I inferred that it was the will of the Legislature that these duties should be performed by the clerk of the new court; that although that will was not expressed in any separate and affirmative statute, it was clearly manifest the language which the Legislature had used in several acts, when taken together, constituted the law of the case as much as if that will had been expressed in one distinct statute.

Now, this was the best I could do in support of a decision which had to be made, and as my associates could suggest nothing

better it was made to pass, and the government went on quietly as before.

Nine years later the court found itself in a similar difficulty in the case of *Wood vs. Blanchard*.<sup>15</sup> Judge Caton began his opinion: "Have we a coroner now? This is the only question presented by this record." Knowing that many titles depended upon the validity of the acts of coroners, especially when they acted as sheriffs, he was compelled to follow the assumption of the law-making power that there was such an officer, and contrary to the general rule read into their acts the intention of the legislators. From these two decisions the only rule to be formulated is, "that the will of the law-maker is the law, when expressed in a constitutional way, and we may look through all its statutes to find a legitimate expression of that will, and when found it is the duty of the courts to enforce it." The safety of the decisions lies in the fact that other courts will not use them as precedents for want of cases parallel.

Judge Caton had to write another difficult opinion in the case of *Shackelford vs. Hall*.<sup>16</sup> That was a case involving the question of illegal conditions in restraint of marriage. Judge Caton in his *Life* tells how he came to decide the case as he did:

In this case a question was presented which had never before been considered in this country, and very rarely in England. The facts of the case show that all of the devisees of the Estate

<sup>15</sup> 19 Illinois Reports, 38.

<sup>16</sup> 19 Illinois Reports, 212.

in remainder, now in controversy, were the heirs at law of the testator, and as such heirs at law, had expectations of the estate. In the absence of the will, each would have been entitled to his or her respective portion of it according to our statute of descent. The testator having devised the estate in his will precisely as the statute would have past it in the absence of a will, imposed the subsequent condition that if either of his children should marry before attaining the age of twenty-one years, he or she should forfeit the estate thus bequeathed. Mrs. Shackelford did not choose to wait until she was twenty-one years old, and so was married before that time. Her brother, Henry H. Hall, then filed a bill to declare the forfeiture, which, upon hearing in the Circuit Court, was dismissed, and thence was brought to the Supreme Court. Upon the arguments for the complainant, the plaintiff in error, the violation of the condition subsequent was relied upon, and really that was about all he had to say in the opening. For the defense it was claimed that the condition was in restraint of marriage, and therefore void; but to this a conclusive answer was given that a reasonable restraint was not only proper but commendable, and that a restraint to the age of twenty-one years, or even a greater age, was not unreasonable, and upon this the case was submitted. So soon as we reached the conference room with the record, Breese broke out and said: "That brother is a mean fellow; yes, he's a great rascal, and we must beat him if possible. Now, Caton, how can it be done?" I replied that the law referred to on the argument was certainly all in his favor, and I didn't remember any law to controvert that, and Judge Walker was equally at a loss to find any way to get around it. I then stated that during the argument there seemed to be, as if it were floating in the atmosphere, some intangible, undefined idea that I had seen something somewhere, some idea, derived from something I had read some time, probably when I was a student, when reading some text-book, that might have some bearing on the case, but what it was I could not say. It was but a vague, indefinite impression, and seemed rather like a

fleeting dream than a tangible idea; that I felt confident that I had never seen a case from which that thought had arisen, and that I felt no assurance that there was any principle laid down in the books, in any way qualifying the decisions which seemed to be so directly in point, holding that this condition subsequent was valid.

Breese then picked up the record from my desk, placed it in my hands, and said: "You take this record and hang it on the tail of that idea till you follow it up to its head, until you find some law to beat this unnatural rascal, who would cheat his sister out of her inheritance just because she wanted to get married a few months before the time fixed by the old man."

I took the record home with me, and after I had finished writing opinions in all my other cases I took up this. I examined carefully all the Digests in the library, and went through the English reports. I sought thoroughly, without finding a single word bearing in any way upon the case, still believing that there was something somewhere that would throw some light upon it on one side or the other. I took down Jarman on Wills, and went home determined to read every text-book in the library on that subject before I would give up the search, and commenced reading at the very beginning, and then proceeded very deliberately, page by page, until I had got, perhaps, two-thirds of the way through the book, when I read a short paragraph which did not at first attract my attention particularly, and I passed on; but before I had finished the next paragraph the previous one began to impress itself upon me, and I looked back and read it again, and the more I studied it the more I thought it contained something to the purpose. It referred to several old English cases, the reference to which I took down, and made my way to the library as soon as possible, impatient to see what these references would develop. In less than an hour I found the law to be as well settled as any other well-recognized principle of law, that where a testator devises an estate to his heir, accompanied with a condition of forfeiture, a breach of that condition shall not work

the forfeiture, unless its existence is brought home to the knowledge of the heir, and this rule applies as well to conveyance by deed as by devise. I still think it a little remarkable that these cases, although few and most of them very old, are not found referred to in any of the Digests which I have consulted, and that no such case appears ever to have arisen in any of the courts of the United States, or in later times in England, and it is probable that to-day this case stands alone in the American reports.

When I read my opinion at the next conference, Judge Breese especially manifested great satisfaction at the result of my investigations, walked across the room and patted me on the back, saying, "Well done, my good boy," and seemed not less pleased at the strictures I had expressed in the latter part of the opinion upon the conduct of the hard-hearted brother, as he termed him, and in this expression we all concurred.

In his opinion given in the case of *Munn vs. Burch*,<sup>17</sup> Judge Caton held that a check on a bank is an assignment *pro tanto* of the funds that the drawer has in the bank. Illinois as well as Kentucky, South Carolina, Nebraska, and perhaps Texas, have held to that doctrine in spite of the great weight of outside authority, commercial usage, and the courts generally of England and America. Judge Caton put the holder's right upon three grounds: first, that the check is an equitable assignment; second, that the promise of the bank to the depositor to honor his check is made for the benefit of the checkholder, who may sue upon it; third, that there is an implied contract between the checkholder and the bank. Again the case was a hard one, and,

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<sup>17</sup> 25 Illinois Reports, 35.

as the old proverb says, hard cases make bad law. The facts were that a man had a check upon a bank for wheat sold to a buyer for eastern people. The man took the check to the bank and ascertained that the buyer had funds there. He left the check there, and the bank charged it against the account of the drawer. It was therefore accepted. But a draft of the buyer's came back protested, and the bank charged off the credit and refused to pay the check, although at the same time the bank had the bill of lading for the wheat and actually got the proceeds. It would have been a simple matter, as Mr. Zane in his work on Banks and Banking points out, to hold that the check had been accepted and that the holder could sue. Neither court nor counsel, however, saw that solution, and the consequence was that a great mass of *dicta* has now become the law of Illinois. Since the rule is at variance with that adopted by the federal courts, it has given rise to considerable and constant confusion. But Judge Caton should not be blamed, as the lack of general banking knowledge led him, counsel and other members of the bench, into the error. His decision quotes no authority, but says that the courts will take judicial notice of some commercial customs, while others must be proved as matters of fact; that where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will take judicial notice of it, and that of such is the custom of bankers to check out their funds in par-

cels. Of course, the custom was not universal, and knowledge of the scientific theory of banking would have prevented the mistake. The mistake was not corrected until the Legislature of Illinois in 1907 adopted the Negotiable Instrument Act recommended by the conference on uniform state laws.

Life in the middle west was changing in the twenty-two years that he was on the bench. Railroads were sending their lines through the rich farming land that was making the state strong and prosperous; and with the coming of the railroads the picturesque circuit riders vanished. Lincoln had been retained in one large case by the Illinois Central Railroad Company, and at the time of Judge Caton's retirement was President of the United States. Others among the circuit riders were winning honors in the war. In the meantime, Chicago, which thirty years before was proud to have one hundred and fifty voters, was looming in the horizon as a great city.

During his term on the bench, Judge Caton was not only studying his cases with such light as the authorities gave, but he was also studying the great country, and he kept with him always the youthful spirit of the pioneer. He had been an original trustee of Rush Medical College. He was interested in popular movements; he was sought as a speaker. A democrat in politics, he still kept, though silently, his views during the war. His enthusiasm seemed to be the study of law, and his suc-



cess in his study was combined with great business capacity and sound common sense.

In 1864, in the vigor of life and with mental powers at their highest, Judge Caton left the bench. Retiring, he said:

I fully appreciate that this, the bench, is a place worthy of any regulated ambition. A wholesome desire for an enduring fame may here find a theater in which it may toil to a useful purpose and with the well-grounded hope of attaining so desirable an end. I resign the great trusts which have been reposed upon me, with the comfortable reflection that I have discharged them with fidelity and with the utmost ability with which I have been endowed.

He left to indulge in other pursuits less exhausting in their nature and more congenial to his tastes. He had early learned to economize his time, and notwithstanding the arduous duties of his judicial position, he had been able to turn his attention to other forms of business and to identify his name with many of the leading enterprises of the day without in the slightest degree interfering with the discharge of his public duty. As early as 1849 he had become connected with telegraphic operations. He studied electricity and became a telegraphic operator. His persistence, energy, and good business ability retrieved the desperate fortunes of the old Illinois and Mississippi Telegraph Company, and put it on a dividend-paying basis, and in 1867 he leased its lines to the Western Union Telegraph Company. After he left the telegraph business his

restless activity found vent in other directions. Starch factories, glass works, and water works were among the industrial enterprises to which he turned his attention. He was especially interested in agriculture, however, and in Ottawa he had perhaps the finest farm in the state. After he had resigned from the bench, he appeared in court only two or three times. He read much, he traveled much, taking special interest in a trip to Norway, and one to the Hawaiian Islands. He was fond of natural history and became an authority in certain branches of it. He made public addresses, perhaps the most remarkable of which was his presentation, on behalf of the Western Alumni, of the Perry H. Smith Library Hall to the trustees of Hamilton College. His writing is simple, lucid, and perspicuous; some of his productions approaching the classical in style and diction. Besides his "Early Bench and Bar of Illinois," he wrote "The Antelope," "Deer of America," "A Summer in Norway," and a volume of miscellaneous writings.

In Chicago he was one of the reliable, wealthy citizens. He had a vast knowledge of men and affairs; he was a practical and sagacious business man, capable of originating and directing the most complex business enterprises. He belonged to the type of men that found cities and nations. His field of operations was within the borders of his adopted state. The influence of his study and genius upon the jurisprudence and the business operations of the

state will always be felt by the careful student, for everywhere he was deemed a wise judge, a far-seeing statesman, and an irreproachable citizen.

No one familiar with the history of the Supreme Court of Illinois will, in the slightest degree, question his fairness and sincerity. Those whose fortune it was to know him, speak in warmest terms of the great consideration which he always showed to younger men, of his rational optimism and his progressive spirit.

On the thirtieth day of July, 1895, Judge Caton died. He was one of the landmarks of Illinois. His sagacity and wisdom had compelled the admiration of the thinking people of the state. His probity had become a tradition. His had been a life of service to the commonwealth, and with the commonwealth he had grown old and full of honors. And to-day Judge Caton stands to Chicago and to the state as a strong man, faithful to the law—the figure of the pioneer judge.



**JOSEPH P. BRADLEY.**



# JOSEPH P. BRADLEY.

1813-1892.

BY

HORACE STERN,

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**A**N anecdote is narrated of Joseph P. Bradley's<sup>1</sup> childhood which may or may not be true, but which at least effectively illustrates one of the most prominent characteristics of his maturity. When he was first learning to read, his mother, in reply to his inquiry, told him that there were twenty-six letters in the alphabet. With the respect due to such a source of information the boy felt quite sure that this statement was accurate, but nevertheless nothing but the certainty acquired by personal examination would satisfy him. Accordingly he scanned the largest volume he could find in his father's library and patiently perused page after page to see whether he could discover any letter which was not included in the list of twenty-six which had been furnished him. It is needless to

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<sup>1</sup> The "P" does not represent the initial letter of a name. Bradley's baptismal name was Joseph. His father's name was Philo, and Bradley adopted the "P" probably merely as a patronymic.

add that, as the result of this minute and painstaking investigation, he finally accepted the number given as the correct one.

The quality which most marked Bradley both as a lawyer and as a judge was thoroughness in investigation. He was of all the eminent judges who have sat upon the bench of the federal Supreme Court the most scholarly and the most profound. It may be and no doubt is true that many excelled him in that peculiar attribute of some jurists which is usually designated as "legal instinct." For example no one had a more unerring power of intuitive judgment than Bradley's associate Mr. Justice Miller. But Bradley was infinitely painstaking, exceedingly cautious, and learned as no other American jurist has been. In any biographical narrative of the lawyers and judges of the United States it would not be improper to characterize him as preëminently the scholar of the American bar.

The success which Bradley attained he gained by hard work. No advantages of family wealth or position were his; no environment was ever less conducive than his to any easy path to fame and glory. His early education he wrested from the humblest of country schools; his living he eked from the most barren of hillside soils. His boyhood was one of wretched poverty and exacting physical labor. Only an indomitable will, a lofty ambition and a remarkable capacity for work opened for him the door that leads to that greatest of all successes—a life



filled with the ability to serve, and richly utilized for the welfare of his countrymen.

As early as 1638 his paternal forefathers migrated from England and settled in New Haven. His great-grandfather participated in the Revolutionary War, and his grandfather in the War of 1812. For generations his ancestors had followed farming for a livelihood, moving in 1791 to Berne in Albany County, New York, where Bradley, on March 14th, 1813, was born. He was the oldest of eleven children, and his early years spent on his father's farm were hard and arduous. For a few months each winter he attended the country school, supplementing the meager education thus gained by a diligent study of any and every book which came within his grasp. From very childhood he had a passion for reading and study, an avidity for knowledge that ceased only at the grave. The crops of the paternal farm were all too scant to support a large family and Bradley helped out the financial deficiencies by cutting wood from the slopes of the Helderberg Mountain, burning it into charcoal and peddling it around the streets of Albany. Spring, summer and autumn, he worked as a laborer on the farm. At fifteen he added to his employments that of teacher in the winter school, and for five years earned a little money in this capacity while continuing his studies, especially mathematics and surveying for which he had a great fondness. His labors, however, were so irksome and he was so eager to improve his con-

dition, that he determined to go down the river to New York and try there to obtain a position. But at this time he met the Reformed Dutch clergyman of the precinct who took an interest in him and offered to teach him the rudiments of Latin and Greek. Bradley gladly availed himself of the opportunity and in this way prepared for entering college.

In September, 1833, there came to Rutgers College at New Brunswick, New Jersey, a most peculiar looking young man, awkward in his manners, and clad in a suit of a nut-brown color which had been wholly woven by his mother on the home farm. At first, by reason of these things, the laughing-stock of his companions, he soon became the object of their respect and admiration. Advanced by his scholarship to a higher grade, he became the classmate of many who in later years attained no small measure of distinction,—such men as Cortlandt Parker, the eminent lawyer of Newark and Bradley's lifelong friend; Frederick T. Frelinghuysen, afterwards Secretary of State; and William A. Newell, subsequently Governor of the state of New Jersey. Even among such rivals Bradley forged to the front, meanwhile supporting himself by teaching. Graduating in 1836, he taught for a short time in an academy at Millstone, Somerset County, New Jersey, and became principal there of the school. At this time his intention was to devote himself to theology, but his college friends, impressed by his manifest ability,

were eager that he should come to Newark and begin the study of the law. Fortunately the Collector of the Port of Newark, Archer Gifford, himself a lawyer, needed an Inspector of Customs, and consented to appoint Bradley to this position, paying him a small salary which enabled him to defray his living expenses, and at the same time received him into his office as a student of the law. Three years later, in November, 1839, Bradley was admitted to the bar.

A superficially attractive personality, engaging manners, brilliant rather than solid attainments, the prestige of influential family and social connections,—any of these may lead to a rapid success at the bar, short-lived, perhaps, if not accompanied by actual ability, but at least without the painful days of waiting for clients that are the lot of those less fortunately gifted by nature. Without these advantages the early years of an attorney's practice are rarely other than dreary indeed. The greater and deeper the power and merit the less rapidly is the world apt to recognize them. It has become a tradition of the bar that amounts almost to a superstition, that quick success is attended in most instances by subsequent permanent failure. Bradley's career was no exception. The first years were years of toil and privation, of much preparation, but little fruit. Of rather an unimpassioned and retiring disposition, he was not one who immediately attracted suitors. Only after opportunities, coming at not too frequent

intervals, had enabled him to demonstrate that he was a wise and safe counsellor and an able advocate, did he begin to attract clients and to lay the foundation of what subsequently became an extended, a varied, and a lucrative practice.

The first step was to ally himself with some one who could attract business which Bradley could take care of for their mutual profit. This was accomplished by the formation of a partnership with the clerk of the county, John P. Jackson, and Bradley also was aided by his friend Frelinghuysen, who employed his help in some cases. To earn necessary money and to broaden his acquaintanceship Bradley also engaged in work not within the regular scope of his practice; for example, during the winter of 1841 he busied himself in the study of legislation at Trenton, and wrote letters concerning it to the "Newark Daily Advertiser," which brought him into some prominence. Then again he achieved some reputation because of his remarkable talents in mathematics. There was much excitement in the state at that time caused by hostility to the Camden and Amboy Railroad Company, which, it was suspected, had not made proper returns to the state as one of its stockholders. The railroad company agreed that a committee of three citizens should examine its books, and this committee appointed Bradley as its clerk. A short time thereafter the Legislature appointed a committee of its own to investigate the matter, and Bradley, being now thoroughly conversant with all

the facts and figures involved, was engaged by the company as its counsel, a position which soon ripened into that of permanent counsel, and subsequently into membership of the company's board of directors. Once launched in this way, progress was easy. Other corporations sought his services. He became counsel of the United Canal and Railway Company, and a member also of its board of directors. He was appointed actuary of the Mutual Benefit Life Insurance Company of Newark, where his aptitude for mathematics found scope in the devising of a new system of life tables, and still later he was elected to the presidency of the New Jersey Mutual Life Insurance Company. Indeed he became famous as a corporation lawyer, and at the same time locally known and respected because of his participation in the communal life of Newark,—in its religious, educational and philanthropical organizations. Thus gradually, very gradually,—for the years in which success thus came stretched over a period of thirty-one years of practice,—Bradley became a prominent citizen not only of his adopted city but of the entire state as well, and his name was not unknown to the country at large as that of an able, an honorable and a successful lawyer.

The secrets of Bradley's progress at the bar were his serious devotion to his work, his scholarly knowledge of the law and his indefatigable industry. In every argument, in every trial he was prepared. No detail escaped his attention. In all that he did and

said he was sure of himself, and therefore others learned to rely upon him, for all his actions and words were the result of careful prior thought and deliberation. It is said that in order to prepare himself for the argument of a legal question relating to the water-power of the City of Paterson, he conducted a private series of experiments to ascertain the pressure of a flow of water under varied conditions, as to the size of orifice and the like, and calculated the results through mathematical formulæ of his own devising. With all his learning, and notwithstanding some little pedantry—for he delighted sometimes to display the minuteness of his knowledge—he was eminently practical. He was a man of the world as well as of the library. He employed the learning of the dead for the solution of the problems of the living. He spoke with contempt of “legal scholars,” meaning “a class of lawyers who are often more learned than sound, and more knowing than safe.” He says of such counsellors:<sup>2</sup>

They will tell you about all the obscure and recondite cases which have been decided on any particular point; what this judge asserted, and what that judge doubted; and yet be unable themselves to form any sound and definite conclusion on the subject—any conclusion for themselves or their clients to adopt as a rule. They will still doubt and hesitate, and fortify themselves with so many “ifs,” and “ands,” and “buts,” that they only “darken counsel by words without knowledge,” and leave those dependent

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<sup>2</sup> “A Memorial of the Life and Character of Hon. William L. Dayton, late United States Minister to France;” a paper read by Bradley before the New Jersey Historical Society in 1865.

upon them for advice in greater doubt and distress than before. Or, if they happen to be of a positive disposition, ever ready to give their opinion at a breath, they are as apt to be wrong as right.

An example of the careful and ingenious arguments which Bradley was wont to prepare is his brief in the case of *The Bridge Proprietors vs. Hoboken Company*,<sup>3</sup> one of his earliest cases in the Supreme Court of the United States. The state of New Jersey had, by act in 1790, given power to certain commissioners to contract for the building of a bridge over the Hackensack River, and by the same statute it was enacted that it should not be lawful for any person or persons whatsoever to erect "any other bridge over or across the said river for ninety-nine years." The commissioners entered into a contract under the terms of this act, and such a bridge was constructed. Subsequently, in 1860, an act of the state was passed, authorizing another company to build a railway viaduct over the Hackensack. The question was whether this act was an infringement of the contract contained in the former statute between the state and the proprietors of the existing bridge. Bradley, who represented the railway company, contended that it was not, in that the viaduct in question was not a "bridge" within the meaning of the act of 1790, since such a viaduct was not in contemplation of the Legislature at that time, and since it could not be crossed by persons except in the

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<sup>3</sup> 1 Wallace's Reports, 116 (1863).

cars of the railway company. This contention was upheld by the Supreme Court in an opinion by Mr. Justice Miller. Bradley's argument, briefly set forth in the report, is wonderful for its logical cogency, its completeness and its cleverness.

By the year 1870 Bradley, fifty-seven years of age, was one of the prominent lawyers in the country. He was a recognized "jurist," not merely a "practitioner." Although not a holder of public office, at least one college had bestowed upon him an honorary degree.<sup>4</sup> His practice, though chiefly in railroad and corporation law, covered a wide field. He was not eloquent nor especially distinguished as a "jury lawyer," but there were few cases of importance in civil law in the courts of New Jersey—real estate matters, patents, will cases, questions of constitutional law, actions in contract and in tort—in which he was not asked to advise. In politics he had taken but little active part, his sole ventures in that line being to accept a nomination of the Republican party for Congress in 1862, only to meet with defeat at the polls, and his heading the Republican electoral ticket in New Jersey in 1868 for Grant and Colfax. His sympathies for the federal cause were of course ardent in their intensity, and when the war broke out he rendered, as counsel and director of the New Jersey railroad companies, valuable assistance to the government in the transporta-

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<sup>4</sup> Lafayette College, 1859, conferred on him the degree of Doctor of Laws.



tion of its troops and military supplies to the front. Now, at an age when most men who have pursued such an active career are wont to prepare for the twilight of life, he was eager for judicial office. This had long been his ambition, and what could be a more honorable one when based, as in his case, upon the claim of proved merit and successful attainment? Older then than most judges at the time of their appointment to the bench of the Supreme Court of the land, he little dreamed that before him lay twenty-two years of service, rich in accomplishment, and leading him to the foremost rank of American constitutional jurists.

The office which Bradley first coveted was that of Chancellor of the state of New Jersey, but his long affiliation with corporations made it impolitic for the Governor to appoint him to such a position. Accordingly he became a candidate for the office of Judge of the United States Circuit Court for the judicial districts of Pennsylvania, Delaware, and New Jersey. Again, however, he was disappointed, for President Grant appointed Judge McKennon to this post. When Mr. Justice Grier retired from the bench of the Supreme Court Bradley's friends worked hard to have him appointed as Grier's successor. The President chose Edwin M. Stanton. It looked as though the desired honor was not to be secured. By Act of Congress, to take effect in December, 1869, it had been provided that the number of justices of the Supreme Court should be increased

from eight to nine, and to the additional position thus created E. R. Hoar, then attorney-general, was appointed. But Stanton died before taking the oath of office, and Hoar's appointment was not confirmed by the Senate. On February 7th, 1870, the President sent to the Senate, to fill these two vacancies, the names of Judge William Strong and Joseph P. Bradley. The latter's nomination was opposed by some on the ground that he was a "railroad lawyer," and by the South on the ground that the new justice should have been selected from one of the southern states. The two nominations being, however, on March 21st of the same year confirmed by the Senate by a decisive majority, Bradley became a member of the highest judicial tribunal of the nation.

He had not been long on the bench when two questions presented themselves for solution,—questions of the gravest import in the history of our jurisprudence, and which put Bradley's abilities to the keenest test. The eyes of the country were fastened upon the new Justice in this emergency. Each of the cases involved political as well as legal problems. The one was that of *Knox vs. Lee*, better known as the *Legal-Tender Case*;<sup>5</sup> the other, the *Slaughter-House Cases*, came before Bradley on circuit.<sup>6</sup> Each case called for an exposition of the fundamental principles of our federal system of gov-

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<sup>5</sup> 12 Wallace's Reports, 457 (1870).

<sup>6</sup> The cases in the Circuit Court are reported in 1 Wood's Reports, 21 (1870).

ernment. The one was to determine the powers of the national sovereignty, the other the powers of the states. In each of them Bradley expressed his views upon these basic subjects, and the people of the United States, whether they shared his views or not, never thereafter doubted that Bradley was able to adorn a bench on which were such associates as Miller, Field, Chase, Swayne, Nelson, Clifford, Davis and Strong.

The charge that Justices Bradley and Strong were appointed to the Supreme Court bench in order to reverse the decision in *Hepburn vs. Griswold*<sup>7</sup>—that the Supreme Court was deliberately “packed” for that purpose,—that Grant selected these two men because their views on the legal-tender question were known or anticipated,—is one that perhaps can be more easily refuted by a statement of the facts than dispelled in the public mind as a disagreeable taint on the history of the court. For a long time it constituted a popular scandal. When it is considered, however, that the nominations of these men were sent to the Senate on the same day but a few hours prior to the time when the opinions in *Hepburn vs. Griswold* were read by the court, it can be readily seen that the charge must be without foundation unless it be further asserted that the President had knowledge of what the decision was to be before it was officially announced from the bench, and, since no proof nor indeed evidence of any kind exists that

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<sup>7</sup> 8 Wallace's Reports, 603 (1869).

any of the Justices thus flagrantly violated the ethics of his office, the entire story may be dismissed as a mere fabrication or suspicion on the part of the opponents of President Grant's administration and of the view of the Supreme Court upholding the constitutionality of the legal-tender acts. Whether it was wise or politic or proper for the court to reconsider its decision in *Hepburn vs. Griswold* is, of course, another question, and one as to which opinions will differ, although there can be no doubt that the respect of the American people for the judiciary is not increased by such reversals of prior rulings, especially in questions of political significance.

The view taken by Bradley in his concurring opinion in *Knox vs. Lee* was that it was not necessary to search the clauses of the Constitution in an attempt to find a vesting in Congress by that instrument of the express power in question. He started at once in his judicial office with a doctrine which even such other judges as entertained it did not adopt until they had long been on the bench, namely, that the central government was endowed with all the powers, whether expressly granted or not, which sovereign governments are wont to possess and exercise. After enumerating all the great powers which were given to the national government by the Constitution, Bradley said:

Such being the character of the general government, it seems to be a self-evident proposition that it is invested with all those

inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions.

At the time the Constitution was adopted it was and long had been the practice of most civilized governments to employ the public credit as a means of anticipating the national revenues; the Continental Congress had issued bills of credit, and it was considered a matter of legislative discretion as to whether or not such bills should be made legal tender; the Continental Congress, not being a regular government, had referred the matter to the state legislatures. No one doubted the power of Congress to issue such bills, and the giving to them, contended Bradley, of the quality of legal tender was merely incidental to their issue. "It is," he said, "absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril." The power in question "is one of those vital and essential powers inhering in every national sovereignty and necessary to its self-preservation." It is true that the power was one not to be resorted to except upon extraordinary and pressing occasions, such as war or other public exigencies of great gravity and importance; but of the times when and the periods during which it should be exercised the legislative de-

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partment of the government was the judge. No true friend of the government could be indifferent to the great wrong it would sustain by a denial of such an essential prerogative.

We thus have at the very outset of Bradley's career upon the bench an expression of his conception of the independence, the dignity and the sovereignty of the national government. This was the keynote of his nationalistic interpretation of the Constitution. Before his mind's eye rose the vision of a self-sufficing state, the country of all its citizens irrespective of state lines and having all the powers necessary, not only for its own preservation, but to enable it to act without impediment and upon an equality with the other nations of the world. Such a government should be a source of the greatest pride to all the American people. Bradley could not understand the selfish local patriotism which looked antagonistically upon the concept of a truly national state. He could not conceive why there should be a feeling of jealousy toward the growth of federal power, as though it were a foreign sovereignty instead of being as much the government of the people as were the states themselves. In his first great dissenting opinion in *The Collector vs. Day*,<sup>8</sup> reported even before the *Legal-Tender Cases*, he says, in opposing the decision of the court that it was not competent for Congress to impose a tax upon the salary of a judicial officer of a state:

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<sup>8</sup> 11 Wallace's Reports, 113 (1870).

It seems to me that the general government has the same power of taxing the income of officers of the state governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the state government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the state governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the state governments, which are constituent parts of the system or body politic forming the basis on which the general government is founded.

Here indeed was a new force acting upon the development of our constitutional jurisprudence. No judge had theretofore taken such advanced views of the independent character of the government at Washington. These were the fearlessly aggressive enunciations of one just elevated to the judiciary and expressed only five years after the close of the great conflict which had been fought to crush the heresy of state sovereignty and decentralization. To us, in our generation, long accustomed as we have been to the utter predominance of the national over the state governments, to the intervention of the federal government in the affairs of our daily lives, to a national concept, to a government that is a world power, ruling distant territories and alien peoples, regulating our railroads, our food-stuffs, our great corporations, these views of Bradley can with difficulty be understood as revolutionary, but the student of our

constitutional history can realize their then novel import and the constant struggle with which such views were combated by Bradley's more conservative associates.

A government may be extremely powerful in matters affecting the nation as a whole and yet not be able to impress the forcefulness of its sovereignty upon its people by reason of the fact that it fails to present itself to them in their exercise of the ordinary pursuits of life and the protection of their fundamental and most cherished liberties. Bradley apparently believed that if the people of the United States had more occasion to invoke the federal authority and thus to become more familiar, so to speak, with its organization and its purposes, they would come to regard it less as a strange and foreign governmental system and more as their own creation and protector. The fourteenth amendment furnished to his mind the means of obtaining this desired end. Accordingly, contemporaneous with his opinion in *Knox vs. Lee*, was his decision, in the United States Circuit Court for the District of Louisiana, of the *Slaughter-House Cases*, subsequently reversed by the Supreme Court.<sup>9</sup> In his opinion in these cases, and his dissenting opinion in the appellate court, Bradley contended that the right to adopt and follow a lawful industrial pursuit is a privilege belonging to citizens of the United States as such, and therefore one which cannot, under the fourteenth amendment,

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<sup>9</sup> 16 Wallace's Reports, 36 (1872).



be impaired or abridged by any of the individual states. His language is noteworthy:

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed. The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in some of the states, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation. The amendment was an attempt to give voice to the strong, national yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil, in the full enjoyment of every right and privilege belonging to a freeman, without fear of violence or molestation.

Here again is the new Justice's own "yearning" for an American citizenship, irrespective of state lines, which should secure all the necessary rights and liberties of civil life. It completes the revelation of Bradley's views of a true nation, and no doubt would, if followed, have rendered the states, without regard to their proud history, the diversity of their settlers, or the variances in their growth, mere provinces for the administration of purely local affairs, and without any real powers in the organization of the federal system.

In the case of most of the Supreme Court Justices one is able to detect, upon study of their opinions, a

gradual maturing of views,—a growing conservatism to be expected with the advance of age. But Bradley was not a young man when he ascended the bench, and between his views at the age of fifty-seven and his views at the age of seventy-six little if any difference can be detected. The phrases of *Mormon Church vs. United States*,<sup>10</sup> are almost identical with those of the *Legal-Tender Cases*.

The incidents of these powers (to acquire territory, to make treaties, to declare war) are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. . . . Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union has any such right of sovereignty over them; no other country or government had any such right.

So we may select almost at random any of Bradley's opinions in the long line from *Ninth Wallace* to *One hundred and forty-one United States Reports*,—all are to the same effect, and picture the same view of the National Government and the same argument against the existence of a tendency to regard it as an alien political and judicial organization. Here, for example, is a quotation from *Clafin vs. Houseman*:<sup>11</sup>

The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as

<sup>10</sup> 136 United States Reports, 1 (1889).

<sup>11</sup> 93 United States Reports, 130 (1876).

the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state,—concurrent as to place and persons, though distinct as to subject matter. . . . If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state and federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

The same theme is expatiated upon in *Ex parte Siebold*.<sup>12</sup> The question involved in that case was the constitutionality of the "Enforcement Act," an act which made it a penal offense against the United States for any election officer, at an election held for a representative in Congress, to neglect to perform, or to violate, any duty in regard to such election,

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<sup>12</sup> 100 United States Reports, 371 (1879).

whether required by a law of the state or of the United States. Could Congress<sup>7</sup> provide for the punishment of state officials for violating state laws? The Court, Mr. Justice Bradley delivering the opinion, held that the act was constitutional, that Congress could legislate upon this subject, but did not have to provide a whole new scheme for the regulation of Congressional elections; it might adopt the state laws and provide simply for their enforcement. Until Congress acted the states could act, and when Congress did act, the laws of the states, so far as they were in conflict with the legislation of Congress, were superseded by the latter, just as in the case of the regulation of interstate commerce. But the case is here mentioned, not so much for what it decided, but as yet another illustration of Justice Bradley's constantly reiterated thought on the duty of patriotism toward the National Government. He says:

It seems to be often overlooked that a national Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation

of our liberties, than is proper to be exercised towards the state governments.

Bradley was a staunch supporter of the doctrine that no state should be allowed in any way to hamper or impede those instrumentalities through which Congress chose to execute the purposes of its delegated powers. This was a necessary corollary of his views of the nature of the National Government. The sovereignty of that government was far more important to his mind than the unimpaired taxing powers of the individual states over the property within their boundaries. He was always fearful lest the selfishness of the local government might defeat the great structure and purposes of the nation. His position on this point was far more extreme than was that of either Miller or Field. As early as 1873, in the case of *Railroad Company vs. Peniston*,<sup>13</sup> we find him dissenting from the opinion of the court which allowed the state of Nebraska to tax the realty and personalty of the Union Pacific Railroad Company, chartered by Congress to establish a national post-road and to facilitate transportation of every kind between the East and the West. Bradley could find no distinction between the question involved in this case and that decided in *McCulloch vs. Maryland*.<sup>14</sup>

The states cannot tax the powers, the operations, or the property of the United States, nor the means which it employs to

<sup>13</sup> 18 Wallace's Reports, 5 (1873).

<sup>14</sup> The latter case is found in 4 Wheaton's Reports, 316 (1819).

carry its powers into execution. . . . Where the general government creates a corporation as a means of carrying out a national object, that corporation and its powers, property, and faculties, employed in accomplishing the service, are the instrumentalities by which the government effects its objects. Hence the corporation is not taxable by state authority. And it matters not that private individuals are interested for their private gain in the stock of the corporation. Such individual interest may be taxable by itself, but the corporation and its property and operations cannot be, without interfering with the agencies used by the Government for the accomplishment of its objects.

It had been argued, and it was so held by the court, that the laying of a tax on the roadbed of the company was nothing more than laying a tax on ordinary real estate. But Bradley combated this contention. A railroad track is essential to the operations of a railroad company, and therefore "to tax the road is to tax the very instrumentality which Congress desired to establish, and to operate which it created the corporation."<sup>15</sup>

True to his ideas of the dignity of the Federal Government, Bradley applied his theory consistently in all other questions which in any way affected the attribute of national sovereignty. To believe that such a government could be sued was abhorrent to his conceptions. As a consequence we find him dissenting from the finely expressed opinion of Mr. Justice Miller in *United States vs. Lee*,<sup>16</sup> on the ground

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<sup>15</sup> See also Bradley's opinion in *California vs. Central Pacific Railroad Company*, 127 United States Reports, 1 (1887).

<sup>16</sup> 106 United States Reports, 196 (1882).

that not only can the United States not be sued without its consent, but that an action brought against its agents, not claiming any right or title in themselves, is an action against the United States itself, and therefore, no matter how apparently flagrant and unjust the evil complained of, no remedy can be sought except to the extent, in the tribunals, and by the methods, allowed and prescribed by Congress. Bradley believed in government, in property and in the stability of authority. He had as a lawyer, represented large property interests and influential corporations, and he was not, as cannot be too often pointed out, a young man when he went upon the bench. He therefore was not the judge to countenance attacks on the established order of things. He wanted strong government, and government that could be respected, and, if necessary, feared. The state governments too, therefore, were not to lack dignity and power, except when the sovereignty of the National Government required their inferiority. A state also, whatever the question involved, could not be sued by a private litigant without its consent. This doctrine was enunciated by the Supreme Court in *Hans vs. Louisiana*,<sup>17</sup> and it was Bradley who wrote the opinion of the Court in that case, although it admittedly overruled *Chisholm vs. Georgia*,<sup>18</sup> which apparently had been decided sufficiently long before to have established itself firmly as the law of

<sup>17</sup> 134 United States Reports, 1 (1889).

<sup>18</sup> 2 Dallas' Reports, 419 (1793).

the land. It was Bradley who wrote the opinion of the Court in *New York Guaranty Company vs. Steele*,<sup>19</sup> in which it was held that a suit against an officer of the state, to compel him, in his official capacity, to act toward the raising of a tax, authorized by a former law, but contrary to subsequent legislation of the state, was an action against the state, and prohibited therefore by the eleventh amendment to the Constitution. It was Bradley who wrote a dissenting opinion in the *Virginia Coupon Cases*,<sup>20</sup>—cases that allowed the recovery of property taken by state officials on judicial process for non-payment of taxes, on the ground that the plaintiffs had made proper tender of payment by the presentation of certain coupons which the state had originally promised to take, but subsequently, under an act breaking the contract, had refused to accept. Bradley thought that the prohibition of the right to sue a state should not be frittered away by refinements, and that these suits were virtually actions against the state to compel a specific performance by the state of its agreement to receive the coupons in payment of all taxes. Only where it was sought to mandamus a state officer to perform a plain official duty requiring no exercise of discretion, or to enjoin him from violating such a duty by some positive official act, and the defendant attempted to justify his action by pleading the authority of an unconstitutional and therefore void law,

<sup>19</sup> 134 United States Reports, 230 (1889).

<sup>20</sup> 114 United States Reports, 269 (1884).



should the action be allowed notwithstanding the mandate of the fourteenth amendment.<sup>21</sup>

In the same way Bradley held, as we should expect him to hold, that a state could not by any contract divest itself of its sovereign powers, for example, its police power.<sup>22</sup> Otherwise the state governments would soon deteriorate to a position where they could command little respect and exercise little real governmental authority.

It already has been stated that Bradley's career at the bar had tended to render him conservative in his attitude toward the protection of property. Having represented corporations and corporate wealth, railroads, banks and insurance companies, he naturally was opposed to any attack on vested rights, and to all socialistic propaganda, which, however, had of course not asserted itself to any marked extent in Bradley's day. Legislation by either the United States or the individual states should not be countenanced if it effected, even in the slightest degree, a confiscation of property, altered a contractual right, or repealed a tax exemption previously granted. Characteristic of Bradley's views on such questions was his dissenting opinion in *Campbell vs. Holt*,<sup>23</sup> in which the court held that the repeal of a

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<sup>21</sup> *Board of Liquidation vs. McComb*, 92 United States Reports, 531 (1875).

<sup>22</sup> *Beer Company vs. Massachusetts*, 97 United States Reports, 25 (1877); *Butchers' Union Company vs. Crescent City Company*, 111 United States Reports, 746 (1883).

<sup>23</sup> 115 United States Reports, 620 (1885).

statute of limitations of actions on personal debts does not, as applied to a debtor the right of action against whom is already barred, deprive him of his property in violation of the fourteenth amendment; Bradley contended that an immunity from prosecution in a suit is a property right, the right of defence being as valuable as the right of action. So also in the famous Sinking-Fund Cases,<sup>24</sup> Bradley dissented. He thought that Congress had no right to enact the legislation which retained in the United States Treasury part of the money due from it to the Union Pacific and Central Pacific Railroad Companies for services rendered to the Government, as a sinking-fund to apply to the payment of the bonds issued by the Government in aid of the construction of these roads. Even though there was in the Constitution no express clause forbidding Congress to impair the obligation of contracts, such a restriction was implied, and Congress could not arbitrarily and despotically violate agreements. Nor did the power reserved in the charters of the railroad companies to alter or amend them make any real difference, because an abrogation of the contracts under the guise of such power was in effect a deprivation of the property of the companies without due process of law and was therefore unconstitutional.

The case of the Bridge Company vs. United States,<sup>25</sup> is another illustration of Bradley's tendency

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<sup>24</sup> 99 United States Reports, 700 (1878).

<sup>25</sup> 105 United States Reports, 470 (1881).

to resist any invasion of the rights of property. In that case Congress had assented to the erection of a bridge by a state corporation across the Ohio River at Cincinnati, provided that it was built in conformity with certain requirements, and when thus built, the bridge was to be a legal structure; if, however, the free navigation of the river should at any time be obstructed thereby, the right to withdraw such assent or to direct the necessary modifications of the bridge was reserved. While the bridge was being erected, Congress, by statute, declared that it would be unlawful to proceed therewith unless certain specified changes were made. The company finished the bridge in conformity with these prescribed changes, and the question was whether it could recover from the United States the cost of making them. The Supreme Court held that as the company had taken from Congress the right to build the bridge subject to the right of Congress subsequently to withdraw the privilege or to prescribe changes of construction, this reservation was a part of the contract or grant, and it was for Congress, not the judiciary, to say whether the bridge as originally planned and approved did obstruct navigation. Bradley dissented from this opinion, as did likewise Justices Miller and Field. His view was that the bridge had been declared to be a lawful structure, and therefore Congress could not constitutionally require its demolition or reconstruction, without providing for compensation to the owners. Only in the case of unlawful

structures can Congress take private property without compensation. Nor did the reserved power alter the case, because there was no stipulation or condition that it might be exercised without providing for reimbursement to the proprietors of the bridge, and it could not be presumed that this reserved power was to be exercised in any other than the constitutional mode.

In their construction of the constitutional and statutory clauses reserving to the states the power to alter, amend or repeal charters of incorporation, Bradley and Field were far keener in their distinctions as to the scope and limitations of this power than any other judges of the federal courts have been. The Supreme Court has taken the position, which is both historically and logically unjustifiable, that the reservation of the power to amend such a charter gives to the state the power to alter it not only to the extent to which the charter embodies a contract between the state and the corporation, but also as regards such provisions as in fact are nothing more than agreements among the stockholders themselves.<sup>26</sup> In *Miller vs. The State*<sup>27</sup> the facts were that the Legislature of New York in 1851 had passed an act enabling the City of Rochester to subscribe for and hold stock in the Rochester and Genesee Railroad Company (a corporation subject to such a

<sup>26</sup> *Close vs. Glenwood Cemetery*, 107 United States Reports, 466 (1882); *Looker vs. Maynard*, 179 United States Reports, 46 (1900).

<sup>27</sup> 15 Wallace's Reports, 478 (1872).

reserved power), and in case the company should elect to receive its subscriptions, the city was authorized to appoint one director of the company for every \$75,000 of capital stock held by the city. The railroad company accepted the subscription of the city on these terms to the amount of \$300,000. In 1865 the Legislature enacted that the city of Rochester should thereafter appoint one director of the company for every \$42,857.14 of capital stock held by the city, thus giving to the latter the right to appoint seven instead of four of the directors of the company. The question before the Supreme Court was that of the constitutionality of this act of 1865, and the court upheld the act as a proper exercise of the reserved right to amend the charter. Bradley, with fine discrimination, and again true to his advocacy of the importance of maintaining the obligation of contracts unimpaired, dissented on the ground that "the agreement with respect to the number of directors which the city of Rochester should elect was not a part of the charter of the company, but an agreement outside of and collateral to it," and "whilst the legislature may reserve the right to revoke or change its own grant of chartered rights, it cannot reserve a right to invalidate contracts between third parties, as that would enable it to reserve the right to impair the validity of all contracts, and thus evade the inhibition of the Constitution of the United States."

Stanch as Bradley was in his defence of property

and of contracts, he was equally firm in his opposition to monopolistic privileges. He may have been what is apt to be loosely denominated a "corporation lawyer," but he knew where to draw the line between property rights and special legislative privileges. In the *Slaughter-House Cases*, which, as has been stated, constituted his first important judicial utterance, he is unsparing in his denunciation of monopolies. To grant such a privilege, he says, is not, and cannot be, a justified exercise of the police power. To give to any person the sole right to engage in a designated occupation within a large area is to deprive other citizens of their property, namely, their right to follow a legitimate trade, and to deprive them also of the equal protection of the laws. The whole history of English jurisprudence is recited to show how odious, from the earliest times, monopolies were to the common law. And eleven years after the delivery of this opinion, in the case of *Butchers' Union Company vs. Crescent City Company*,<sup>28</sup> Bradley says:

Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market, and in many other ways. If by legislative enactment they can be carried into the common avocations and callings of life, so as to cut off the right of the citizen to choose his avocation, the right to earn his bread by the trade which he has learned, and if there is no constitutional means of putting a check to such enormity, I can only say that it is time the Constitution

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<sup>28</sup> 111 United States Reports, 746 (1883).

was still further amended. In my judgment the present Constitution is amply sufficient for the protection of the people if it is fairly interpreted and faithfully enforced.

Perhaps the opinion of Bradley which is least in conformity with his general attitude toward vested property rights, least to be expected from one whose practice at the bar had been in the channels in which his had been, and least also in harmony with the later decisions of the courts, however it may coincide with public opinion and prejudice, is his dissent in the leading and important case of *Chicago, Milwaukee and St. Paul Railway Company vs. Minnesota*.<sup>29</sup> Mr. Justice Blatchford, delivering the opinion of the Supreme Court in that case, held that an act of the Legislature of Minnesota establishing a railroad and warehouse commission, and providing that the rates of charges for the transportation of property recommended and published by the commission should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates, was unconstitutional as applied to a railroad company which pleaded that the rates established by the commission were unreasonable, and which was not allowed by the state court to offer testimony on the question of the reasonableness of such rates; such a company was deprived by the act of its property without due process of law, and was likewise deprived of the equal protection of the laws. In opposition to this

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<sup>29</sup> 134 United States Reports, 418 (1889).

decision, now so universally recognized and sustained by the courts, Bradley contended that it was in effect an overruling of *Munn vs. Illinois*,<sup>30</sup> the governing principle of which had been that the regulation and settlement of the fares of railroads and other public accommodations was a legislative and not a judicial prerogative, and that the Legislature had the right, if it chose to exercise it, to declare what was a reasonable rate or fare. It is difficult to see why, under such a view of the law, the Legislature could not, under pretense of regulating its rates, utterly destroy the earning power of a railroad or other *quasi*-public company, and thus practically confiscate its property, and in spite of the ability with which Justice Bradley stated his views it is not surprising that such a doctrine has failed to receive the sanction of our judiciary, however public clamor may inveigh against the barrier which the ruling in *Chicago, Milwaukee and St. Paul Railway Company vs. Minnesota* places between such corporations and the unbridled, hostile action of state Legislatures.

All truly great Anglo-Saxon judges have been protectors of the fundamental rights of the individual citizen against governmental tyranny and oppression, and Bradley was no exception in this respect. Although he did not render as many famous decisions involving the question of personal rights as did some of his associates, those in which he expressed his opinion are sufficient to indicate his views upon this

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<sup>30</sup> 94 United States Reports, 113 (1876).



subject. His most elaborate and forceful exposition of the importance of a broad protection of individual rights is to be found in the opinion of the court which he wrote in the case of *Boyd vs. United States*.<sup>31</sup> The question involved was the constitutionality of a customs revenue law which authorized the federal courts, in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices and papers; upon failure or refusal to obey the order, the allegations of the government attorney were to be taken as confessed. The court held that the act was void as applied to suits for penalties, or to establish a forfeiture of goods, being repugnant to the fourth and fifth amendments to the Constitution. The fourth amendment was violated, because it does not require an actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment, and it is equivalent to a compulsory production of papers to make the non-production of them a confession of the allegations which it is pretended that they will prove. And the fifth amendment was violated by the act, because the seizure or compulsory production of a man's private papers to be used in evidence against him is equiva-

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<sup>31</sup> 116 United States Reports, 616 (1885).

lent to compelling him to be a witness against himself; and a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, is a "criminal case" within the meaning of the fifth amendment. Bradley's opinion in this case is of great length, scholarly, and at times eloquent, although in general the expression of his views is not as enthusiastic in style nor as oratorical as were the opinions of Mr. Justice Miller. Nor did Bradley follow Miller in some of the latter's highly technical and refined decisions designed to uphold personal liberty,—such, for example, as *Kring vs. Missouri*,<sup>32</sup> and *In re Medley*,<sup>33</sup> in each of which he dissented.

It fell to Bradley's lot to construe in various aspects the fourteenth and fifteenth amendments to the Constitution. We have seen that the Slaughter-House Cases came before him on circuit during the first year of his service upon the bench. To the views expressed by him in those cases he ever afterward strictly adhered.<sup>34</sup> But in the course of his judicial career, he placed upon the fourteenth and

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<sup>32</sup> 107 United States Reports, 221 (1882).

<sup>33</sup> 134 United States Reports, 160 (1889). Bradley also dissented from the opinion of the Court in *Pierce vs. Carskadon*, 16 Wallace's Reports, 234 (1872), which involved the same facts and principle as *Cummings vs. State of Missouri*, 4 Wallace's Reports, 320 (1866), and *Ex parte Garland*, 4 Wallace's Reports, 333 (1866). His dissent was on the ground that the test oath in question was one which it was competent for the State to exact as a war measure.

<sup>34</sup> Concurring opinion in *re Butchers' Union Company vs. Crescent City Company*, 111 United States Reports, 746 (1883). See also concurring opinions in *Bradwell vs. the State*, 16 Wallace's Reports, 130 (1872), and in *Bartemeyer vs. Iowa*, 18 Wallace's Reports, 129 (1873).

fifteenth amendments at least three important restrictions.

One was laid down in his opinion in *Missouri vs. Lewis*,<sup>35</sup> in which he declared that the fourteenth amendment contemplated only persons and classes of persons; that it did not profess to secure to all persons within a state the benefit of the same laws and the same remedies, but only that no person or class of persons should be denied the same protection of the laws which was enjoyed by other persons or other classes in the same place and under like circumstances; therefore a state could provide different kinds of jurisdiction for different courts in different counties, provided that all persons within the territorial limits of their respective jurisdictions had an equal right, in like cases and under like circumstances, to resort to them for redress.

A second limitation of the scope of these amendments was established in Bradley's opinion in *United States vs. Cruikshank*,<sup>36</sup> a case which arose in the Circuit Court for the District of Louisiana, and was subsequently affirmed by the Supreme Court of the United States in an opinion by Chief-Justice Waite.<sup>37</sup> A great number of persons had been indicted under the so-called "Enforcement Act" of 1870, on the charge of having conspired to injure certain negroes in the exercise of specified rights, among which was

<sup>35</sup> 101 United States Reports, 22 (1879).

<sup>36</sup> 1 Woods' Reports, 308 (1874).

<sup>37</sup> 92 United States Reports, 542 (1875).

the right to vote. The question was whether the indictment charged the commission of a crime against the United States. Bradley distinguished, in his opinion, between such rights and privileges as were secured in the Constitution only by a declaration that the states should not violate nor abridge them, and such as were secured by a statement in general terms that such rights and privileges should exist. An example of the former class was the prohibition of the states to impair the obligation of contracts; in that case Congress could not pass a law for the general enforcement of all contracts as among individuals. An example of the second class was the declaration that slavery should not exist in the United States; in that case Congress could enact legislation aimed directly at individuals within the states prohibiting them from holding persons as slaves. The right to vote, as secured by the fifteenth amendment, belonged to this latter class, but it was not the deprivation of the right to vote that was prohibited by that amendment, but such deprivation because of race, color or previous condition of servitude. Hence all that Congress could do was to pass legislation providing that there should be no denial of the right to vote on account of racial grounds; and as the indictment in this case did not show that the negroes were injured in their exercise of the right to vote merely because they were negroes, the Court held that the indictment was fatally defective.

A third and even more important ruling was that

enunciated by the Supreme Court in the famous Civil-Rights Cases,<sup>38</sup> Bradley delivering the opinion of the court. In these cases the Civil Rights Bill was declared unconstitutional. That act provided that all persons within the jurisdiction of the United States should be entitled to the full and equal enjoyment of the accommodations and privileges of inns, public conveyances, theaters, and other places of public amusement, and that any person who should deny to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of such accommodations or privileges, should be subject to an action on the part of the person aggrieved thereby, or, at the latter's election, to a criminal penalty. The opinion of Justice Bradley was to the effect that the fourteenth amendment prohibited only a state from denying to any person the equal protection of the laws. He said:

It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation, but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. . . . Where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular state

<sup>38</sup> 109 United States Reports, 3 (1883).

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legislation or state action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.

The years of Bradley's career upon the bench, from 1870 to 1892, were characterized by a wonderful expansion of the country's commerce. In the decades following the Civil War, trade and industry increased enormously, and no problems presented themselves to the judiciary so frequently as did those of commerce and navigation. In every volume of the Supreme Court reports for these years are to be found great numbers of decisions marking off the relative powers of state and nation to regulate transportation and interstate traffic. The attitude of Justice Bradley toward these problems is distinct, clearly defined and usually consistent. No one was more aggressive than he in asserting the supremacy of the Federal Government in controlling interstate commerce. He looked upon his work on this subject as the most important of his activities upon the bench. In matters of foreign and interstate commerce there are, he proclaimed, no states. He considered all traffic crossing state lines as fully a national question as were matters relating to the currency, the patent laws, or the regulation of the nation's army and navy. From his concurring opinion in *Ward vs. Maryland*,<sup>39</sup> decided in the first year of his judicial service, to his

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<sup>39</sup> 12 Wallace's Reports, 418 (1870).

dissenting opinion in *Maine vs. Grand Trunk Railway Company*,<sup>40</sup> almost the last decision of the court in which he participated, there is scarcely a break in the long line of cases in which he protests against the powers claimed by individual states to tax interstate commerce or the instrumentalities of interstate commerce under any form or guise whatsoever.<sup>41</sup>

<sup>40</sup> 142 United States Reports, 217 (1891).

<sup>41</sup> The exceptions are Bradley's opinions in (1) *Railroad Company vs. Maryland*, 21 Wallace's Reports, 456 (1874), in which he held valid a statute of Maryland granting to the Baltimore and Ohio Railroad Company the right to construct a branch road from Baltimore to Washington and imposing a tax on the gross amount received by it from the transportation of passengers over the road, which Bradley considered merely a charter stipulation that the company should pay to the state a bonus or portion of its earnings, and, as such, different in principle from the imposition of a tax on the transportation of goods or persons from one state to another; and (2) in *Wabash, St. Louis and Pacific Railway Company vs. Illinois*, 118 United States Reports, 557 (1886), in which Bradley dissented. In that case a statute of Illinois enacted that, if any railroad company should, within that state, charge for transporting passengers or freight of the same class the same or a greater sum for any distance than it did for a longer distance, it should be liable to a penalty for such unjust discrimination. The defendant company did thus discriminate in regard to goods shipped over the same road from Peoria, Illinois, and from Gilman, Illinois, to New York, charging more for the same class of goods from Gilman than from Peoria, although the former was eighty-six miles nearer to New York than the latter, this difference of mileage being in the length of the line within the State of Illinois. The Court, per Mr. Justice Miller, held the act unconstitutional, as being an attempted regulation of interstate commerce within the exclusive control of Congress. Bradley asserted that the state did not lose its power to regulate the charges of its own railroad companies in its territory, simply because the goods or persons transported had been brought from or were destined to a point beyond the state boundary, and that this was within the legislative power of the state until Congress acted thereon. "All local arrangements," he said, "and regulations respect-

Inclined as Justices Miller and Field undoubtedly were to a strengthening of the control of the National Government over interstate commerce, their decisions are far from being as radical in this direction as were those of Bradley, and no one else has contributed so markedly as he toward the placing of commerce on an impregnable and uniform basis and the freeing of it from those shackles of state interference, greed and jealousy which had bound it in greater or less degree from the days of the Articles of Confederation to the Civil War and even beyond it.

ing highways, turnpikes, railroads, bridges, canals, ferries, dams and wharves within the state, their construction and repair, and the charges to be made for their use, though materially affecting commerce, both internal and external, and thereby incidentally operating to a certain extent as regulations of interstate commerce, are within the power and jurisdiction of the several states." He argued that if it were not for the state the railroad company would not have the right to charge any fares or freight at all; therefore the state could regulate the charges which it alone had authorized, and although such regulations might incidentally affect and regulate commerce, it was within the power of the state until Congress acted. It would be a different question were there any discrimination against the citizens or products of other states, or were there an attempt to tax interstate commerce itself, instead of merely regulating the charges for services rendered by the railroad company.

Bradley's decisions in *Coe vs. Errol*, 116 United States Reports, 517 (1885); *Turpin vs. Burgess*, 117 United States Reports, 504 (1885), and *Brown vs. Huston*, 114 United States Reports, 622 (1884), were not to the effect that interstate commerce could be taxed, but that in these cases there was no question of such commerce involved, the interstate journey either not having started or having been completed when the tax was imposed. The last named case is interesting as involving Bradley's statement that "a duty on exports must either be a duty levied on goods as a condition, or by reason of their exportation, or, at least, a direct tax or duty on goods which are intended for exportation."



Upon denying to the individual states the right to interfere with railroads and steamship lines doing an interstate business, Bradley was especially insistent. In his last opinion on this subject, his dissenting opinion in *Maine vs. Grand Trunk Railway Company*, above referred to, speaking of the decision of the court, which was rendered by Mr. Justice Field, he says:

It comes to this: a state may tax a railroad company upon its gross receipts in proportion to the number of miles run within the state, as a tax upon its property, and may also lay a tax upon these same gross receipts in proportion to the same number of miles, for the privilege of exercising its franchises in the state! I do not know what else it may not tax the gross receipts for. If

In this connection should also be mentioned the fact that Bradley conceded that the states, and their agents the municipalities, had the right to impose wharfage charges on vessels discharging or receiving freights on or from wharves provided by such states or municipalities, and that, no matter how exorbitant or unreasonable such charges might be, nor what profits to the state or municipality they might involve, the only redress was, in the absence of action by Congress, in the state courts; nor would the federal courts look beyond the face of the statute or ordinance itself to determine the real character of the charges, as to whether they were wharfage charges or duties of tonnage. *Transportation Company vs. Parkersburg*, 107 United States Reports, 691 (1882); *Ouachita Packet Company vs. Aiken*, 121 United States Reports, 444 (1886). On the other hand Bradley dissented from the opinion of the Court in *Morgan's Steamship Company vs. Louisiana Board of Health*, 118 United States Reports, 455 (1885), in which, in an opinion by Mr. Justice Miller, the Court held that a requirement of the State of Louisiana that each vessel passing a quarantine station in the state should pay a certain fee for examination as to its sanitary condition and the ports from which it came, was a compensation for services rendered to the vessel, and not a tonnage tax, and that such legislation belonged to that class of regulation of interstate or foreign commerce which the states might establish until Congress acted in regard thereto.

the interstate commerce of the country is not, or will not be, handicapped by this course of decision, I do not understand the ordinary principles which govern human conduct.

The court in this case had sustained the constitutionality of a state statute which required every corporation, person or association operating a railroad within the state to pay an annual tax for the privilege of exercising its franchises therein, to be determined by the amount of its gross transportation receipts, and further provided that, when applied to a railroad lying partly within and partly without the state, or to one operated as a part of a line or system extending beyond the state, the tax should be equal to the proportion of the gross receipts in the state, to be ascertained in the manner provided in the statute. It was Bradley's contention that although the tax professed to be one for the privilege of the railroad company exercising its franchises in the state, it was, in fact, a tax on the gross receipts of the company which came partly from interstate commerce, and that fact was sufficient to render it, in Bradley's opinion, unconstitutional, without the necessity of a more searching analysis. He had similarly pronounced unconstitutional an attempted tax upon the gross receipts of a steamship company derived from the transportation of persons and property between different states, in his decision in *Philadelphia Steamship Company vs. Pennsylvania*,<sup>42</sup> which was the first case to take a decided position on this subject and to

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<sup>42</sup> *United States Reports*, 326 (1886).

overrule the previous leading case to the contrary.<sup>43</sup> So far did he go in denying to the states the right to legislate in such manner as would, even remotely, affect interstate carriers, that he dissented, in *Smith vs. Alabama*,<sup>44</sup> from the opinion of the court sustaining the validity of a state statute which required locomotive engineers within the state to be examined and licensed by a board of inspectors, and which applied also to the case of engineers on trains crossing the state from without it to another point without the state.

One of Bradley's most important dissents in this line of cases was that contained in *Pullman's Palace Car Company vs. Pennsylvania*.<sup>45</sup> The state of Pennsylvania had imposed a tax upon the capital stock of all corporations engaged in the transportation of freight or passengers within the state, taxing the Pullman Company, a foreign corporation engaged in running railroad cars into, through and out of the state, and having at all times a large number of such cars within the state, by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars were run within the state bore to the whole number of miles in this and other states over which its cars were run. The Supreme Court held this act constitutional on the ground that the cars of the Pullman

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<sup>43</sup> *State Tax on Railway Gross Receipts*, 15 Wallace's Reports, 284 (1872).

<sup>44</sup> 124 United States Reports, 465 (1887).

<sup>45</sup> 141 United States Reports, 18 (1890).

Company were situate, even though merely temporarily, within the state, and were therefore subject to taxation by the state. Bradley's dissent proceeded on the theory that "the states of this government are not independent nations;" that they cannot tax all the property within their limits,—certainly not property merely carried through them; that property acquires a *situs* for taxation in a state when permanently located within it, even though its owner might live elsewhere, and that it might be taxed in the state where its owner lived as well; but that cars, vehicles of commerce, interstate or foreign, and intended for its movement from one state or country to another, and having no fixed or permanent *situs* or home, except at the residence of the owner, cannot, under the Constitution, be taxed in the places where they only go or come in the transaction of their business; that it was the same with cars as with ships, and that certainly a ship traveling from England to New York ever so regularly could not be taxed by the state of New York, nor could a ship traveling from New York to New Orleans be taxed by the intermediate states through whose waters it passed. The opinion of the court, Bradley claimed, would lead to a course of spoliation and reprisals that would endanger the harmony of the Union.

Another example of the same trend of thought and reasoning is to be found in his opinion in *Leloup vs. Port of Mobile*,<sup>46</sup> where the Western Union Tele-

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<sup>46</sup> 127 United States Reports, 641 (1887).

graph Company, which had accepted the provisions of, and was acting under, the telegraph law of Congress of 1866, and whose business consisted in transmitting messages to all parts of the United States, was required by the City of Mobile, upon establishing an office there, to pay to the city an annual license tax. Bradley stated the law to be that telegraphic communications are commerce, as well as in the nature of postal service, and if carried on between different states they are interstate commerce, and within the power of regulation conferred upon Congress, free from the control of state regulations, except such as are strictly of a police character; and any state regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void. A general license tax on a telegraph company affects its entire business, interstate as well as domestic or internal. The property of a telegraph company permanently situated within the state may be taxed by the state as all other property is taxed, but its business of an interstate character cannot be thus taxed. Therefore the ordinance of the city of Mobile was, so far as it related to this company, null and void.

Not only should protection, in Bradley's opinion, be extended to carriers engaged in interstate or foreign traffic, but he was equally solicitous in preventing any state from discriminating against the products or citizens of other states in transacting business within such state. Indeed even if there were no dis-

crimination he invariably protested against any and all state legislation which impeded the free sale of the products of one state within the boundaries of another. When the court held, in *Ward vs. Maryland*,<sup>47</sup> that a statute of Maryland, making it a penal offence in any person not a permanent resident in the state to sell in the state any merchandise other than that manufactured in Maryland, without first obtaining a license, for which a certain sum had to be paid, was unconstitutional, because it imposed a discriminating tax upon non-resident traders, Bradley concurred in the court's decision, but added that the law would, in his opinion, have been invalid even though it would not thus have discriminated, because such a law would prevent the manufacturers of some states from selling their goods in other states unless they established commercial houses therein, or sold to resident merchants who chose to send them orders, and any act imposing such a burden, whether in the shape of a tax or a penalty, even though levied equally upon residents and non-residents, was flagrantly opposed to the Constitution. It was Bradley who delivered the opinion of the Court in *Walling vs. Michigan*,<sup>48</sup> holding unconstitutional a state statute which imposed a tax on persons who, not residing or having their principal place of business in the state, engaged there in the business of selling or soliciting the sale of intoxicating liquors to be

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<sup>47</sup> 12 Wallace's Reports, 418 (1870).

<sup>48</sup> 116 United States Reports, 446 (1885).

shipped into the state from places without it, but did not impose a similar tax on persons selling or soliciting the sale of intoxicating liquors manufactured in the state; and in *Robbins vs. Shelby County Taxing District*,<sup>49</sup> in which an act of Tennessee, which provided that all drummers and persons not having a regular licensed house of business in a specified taxing district, offering for sale or selling merchandise therein by sample, should be required to pay a certain tax for such privilege, was pronounced invalid so far as it applied to persons soliciting the sale of goods on behalf of persons doing business in another state, Bradley again remarking that it was immaterial that no discrimination was made by the act in favor of domestic as against foreign salesmen, because interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state; and the negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. And it was Bradley who, in *Crutcher vs. Kentucky*,<sup>50</sup> held that an act of Kentucky, which provided that the agent of a foreign express company could not, under penalty of a fine, carry on business within the state without first obtaining a license, to be granted only upon the

<sup>49</sup> 120 United States Reports, 489 (1886). Affirmed and followed in *Corson vs. Maryland*, 120 United States Reports, 502 (1886), and *Asher vs. Texas*, 128 United States Reports, 129 (1888).

<sup>50</sup> 141 United States Reports, 47 (1890).

agent's proving that his company was possessed of a certain minimum capital, was repugnant to the Constitution, and used the following vigorous language:

To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States. . . . It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state Legislature could prohibit a foreign corporation,—an English or a French transportation company, for example,—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. . . . And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two.

It is not necessary to cite other decisions and excerpts from his opinions to illustrate the views of Bradley upon the power of regulation of interstate and foreign commerce, and the need, for true commercial development, of maintaining such intercourse untrammelled by the action of the individual states.<sup>51</sup> He not only exercised incalculable influ-

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<sup>51</sup> Among his other opinions on this subject might be mentioned *Wiliamette Iron Bridge Company vs. Hatch*, 125 United States, 1 (1887); *Voight vs. Wright*, 141 United States Reports, 62 (1890); and *Neilson vs. Garza*, 2 Woods' Reports, 287 (1876).



ence in nationalizing the power of commercial regulation, but he rendered decisions construing the maritime law which were of the greatest importance. For this particular field of jurisprudence he was keenly gifted because of his broad learning and his studies in comparative history and law. An instance of this is to be found in *Insurance Company vs. Dunham*,<sup>52</sup> almost his first reported case in the Supreme Court, in which all the ancient writers of numerous countries on maritime law are cited, and the whole history of maritime insurance reviewed, including a lengthy analysis of the English and American cases. And in such cases as *Norwich Company vs. Wright*;<sup>53</sup> *The Lottawanna*;<sup>54</sup> *The North Star*;<sup>55</sup> and *The Scotland*,<sup>56</sup> he showed his immense learning, breadth of view, and practical nature, by building up a code of principles of maritime jurisprudence which was adapted to the needs and customs of our country, rather than slavishly based upon the dogmas of general maritime law.

For decisions upon questions of patent law he was also peculiarly equipped because of his fondness for mechanics and other scientific studies. Indeed to every branch of the law he loaned his wonderful powers of research and the results of his continued years of study, and no phase of law was left un-

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<sup>52</sup> 11 Wallace's Reports, 1 (1870).

<sup>53</sup> 13 Wallace's Reports, 104 (1871).

<sup>54</sup> 21 Wallace's Reports, 558 (1874).

<sup>55</sup> 106 United States Reports, 17 (1882).

<sup>56</sup> 115 United States Reports, 24 (1885).

touched by his opinions on the Supreme Court bench, nor was any single opinion handed down by him that did not show similar indications of patient study, careful thought, and accurate expression.<sup>57</sup>

Reference has frequently been made to Bradley's scholarly equipment, but his learning was so profound that it would be difficult to exaggerate this phase of his nature. From childhood he had a passion for books, and he not only bought them but he read them, and read them again and again, and so extensive were his researches and so wonderfully retentive his memory that he came to have an expert's knowledge of the most abstruse and difficult subjects. His chief study was mathematics, but he delved deeply into astronomy as well, and likewise theology, languages, hieroglyphics, literature, art, science and political economy. While sitting in church he was wont to follow the reading of the Bible in a Greek text which he kept in his pew, observing the literalness of the translation as he proceeded. Hebrew and Arabic he studied, to say nothing of the leading modern languages. He calculated eclipses, studied the transit of Venus, made calendars for determining on sight the day of the week of any date for forty

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<sup>57</sup> Among his more interesting decisions and opinions are those concerning the power of the Supreme Court to review the judgment of a lower court upon *habeas corpus* proceedings; *Ex parte Parks*, 93 United States Reports, 18 (1875); *Ex parte Siebold*, 100 United States Reports, 371 (1879); and that involving a discussion of the right of the federal courts to interpret state law independently of the decisions of the state courts; *Burgess vs. Seligman*, 107 United States Reports, 20 (1882).

centuries and the time of the new moon in any month of any century past or future. Practical engineers and college professors alike wrote to him soliciting his advice and his judgment on mechanical problems and scientific devices and methods. "The lawyer ought, indeed, to know almost everything," he once said in a lecture to the students of a university law school,<sup>58</sup> "for there is nothing in human affairs that he may not, some time or other, have to do with." In his miscellaneous writings, published after his death by his son, there are essays on politics, history, philosophy, philology and sociology, a treatise on the "Recurrence of Ice Periods in the Northern Hemisphere," on the "History of the first Steam-Engine in America," on "Noah's Ark," explaining the dimensions and shape of the structure and the probable plan of distribution of the animals therein; then there is an article on the "Force of Water as used in Hydraulic Machinery in Mining," followed by "Esoteric Thoughts on Religion and Religionism." These studies were not "fads" of Bradley, nor mere superficial results of an affectation of learning, but real inquiries, conducted with patience and perseverance, intended to elicit the truth, which alone could satisfy his mind, and designed also to satiate his intense craving for continuous labor. Often he would work far into the dawn upon some self-imposed problem, and not infrequently spend days following up an investigation, just for the sake of con-

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<sup>58</sup> University of Pennsylvania; Lecture on Law (1884).

quering the difficulties which it presented. And the knowledge thus gained was assimilated and made a part of himself, so that it could always be applied by him when demanded.

It is almost needless to say that with such proclivities for general study, Bradley was likewise a profound student of the law,—not only English, but also Roman law, the Code Napoleon, and the laws of Continental Europe. Being assigned, upon his elevation to the bench, to the fifth circuit, consisting of the States of Georgia, Florida, Alabama, Mississippi, Texas and Louisiana, he had to administer the civil law in the last named state, and the semi-Spanish law of Texas, and it was not long before he had become so proficient in these as to command the admiration of the lawyers practicing in those jurisdictions. He knew the cases. “No lawyer,” said John G. Johnson, “no matter how thorough his research in any particular case, was able to present to him an authority of which he was ignorant, or a principle of law which was new to him.”<sup>59</sup> He was a patient listener to the arguments of counsel, pondered carefully over the question involved, examined diligently the briefs submitted to him, ransacked his library for all possible authorities, wrote a draft of his opinion, laid it aside for future consideration, returned to it and rewrote it, and finally molded it in this way into a finished production. Sometimes judges are

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<sup>59</sup> Memorial exercises in the Supreme Court on the death of Mr. Justice Bradley.

extremely laborious and painstaking during their first years of service, but afterwards tend to become careless, and to write shorter and less thoughtful opinions. But from Bradley the habits of the scholar never departed. As late as 1889, in a case in the Circuit Court for the District of New Jersey, *Baeder vs. Jennings*,<sup>60</sup> he wrote an opinion which constitutes a valuable historical paper on the land titles of New Jersey which could have been the product only of the most diligent toil. He was a student to the end.

But Bradley was more than a student. A person may be learned and yet helpless in the workaday world around him, pedantic and yet not wise. Bradley was practical. He utilized his resources. He had great reasoning powers. His legal opinions are not mere recitals of precedents nor storehouses of imbibed information, but are logical considerations of the principles involved, fortified by a citation of authorities. The truth was what Bradley wanted, and not merely what others had thought to be the truth. Law is logic as well as precedent; is precedent only, with great judges, when the precedent and logic are one. From the opinions of others Bradley sought what was best, and from law books he sought not facts but principles.

He once said:<sup>61</sup>

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<sup>60</sup> 40 Federal Reports, 199.

<sup>61</sup> "A Memorial of the Life and Character of Hon. William L. Dayton, late United States Minister to France," read before the New Jersey Historical Society, 1865.

The law is a science of principles, by which civil society is regulated and held together, by which right is eliminated and enforced, and wrong is detected and punished. Unless these principles are drawn from the books which a student reads, and deposited in his mind and heart, his much reading will be but a dry and unprofitable business. On the contrary, if these principles are discovered beneath the dry husks of the text-books and reports, if they are extracted, mastered and retained, it will not be so much the number of the books studied, as the success with which this digesting and assimilating process is pursued in studying them, which will make the great and successful lawyer.

The service of Bradley as a member of the Electoral Commission in 1877 subjected him for a time to much unpopularity and hostile criticism; it was said that his first opinion on the questions involved was opposed to the contention of the Republican candidate, but that he was persuaded, through the pressure brought to bear upon him by politicians of that party and by Mr. Justice Miller, to cast his vote with the other Republicans on the Commission. Inasmuch as Bradley was wont to reconsider and rewrite most of his opinions, the mere fact that he altered this one would not be significant as to the purity or sincerity of his motives in so doing. The Electoral Commission was, as an institution, most unfortunate; its members all voted according to their political proclivities, disguised in the garb of judicial utterances. Bradley certainly was no more open to censure than any of the other members of the Commission, and there is no reason for believing that, however unconsciously his views may have been prejudiced, he de-

liberately subordinated his real opinion to the effecting of a desired political result.

Bradley was always a great worker. Toil, absorbing and unending, was his delight. In the summer time he traveled on circuit in the south, holding court in Galveston, San Antonio, Houston, Dallas, New Orleans, Jackson, Mobile, Jacksonville, Savannah or Atlanta. After he had been on the bench for ten years, and upon Mr. Justice Strong's retirement, he was transferred from the fifth to the third circuit, consisting of the States of New Jersey, Pennsylvania and Delaware. Almost the last public act of his life was to preside at the organization of the Court of Appeals in that circuit, in June, 1891. He died, January 22d, 1892, at Washington, where he had lived ever since his appointment to judicial office, having attained almost to the completion of four-score years.<sup>62</sup>

It is rare, if ever, that a judge attains great popularity. Favor with the populace is reserved for warriors, executives and legislators; it is based upon brilliancy of deed rather than upon merit of accomplishment. To the people the work of the judiciary is, in general, of neither romantic interest nor historical significance. Bradley could scarcely be said to have been one who was an exception to this rule. He did not evoke demonstrations of public affection or re-

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<sup>62</sup> Bradley married, in 1844, Mary, the youngest daughter of Chief-Justice Hornblower of New Jersey. His wife and four children survived him.

gard. His scholarly nature, his reserved temperament, his undemonstrative manner, tended to remove him from the masses. He never condescended either to levity or familiarity. Neither had he a commanding presence, for he was a man below the medium height, of slight build and frail constitution. But his keen eye, thin, compressed lips, and thoughtful countenance bespoke the mental capacity of the man. In manner he was kindly and democratic, and not nearly as stern or imperious as was Miller, but grave and sedate, inclined sometimes, it is true, to petulance and to demonstrations of an irascible temper, but quickly repentant of any offense created by hasty word or action. His dignity was the dignity of simplicity, his strength the strength of quiet power. Men learned to trust him, both as a lawyer and as a judge, for his preparation was thorough, his equipment complete. He could well afford to scorn attempts at displays of brilliancy; it is the volume and not the ruffled surface of the ocean that makes it the most potent force of nature. And while American public life has produced men of remarkable ability, scholarship has not been so common a virtue of our statesmen that Bradley's fame is apt to be dimmed by comparisons. Many as were his other attainments, his legal erudition alone would entitle him to a preëminent rank in that long line of jurists who have made the Supreme Court of the United States the greatest judicial tribunal in the world.



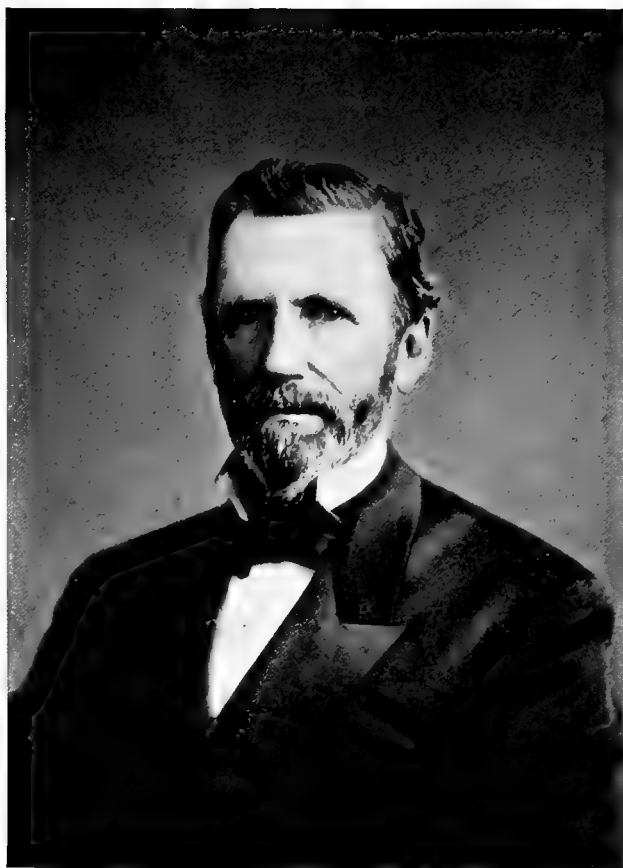
**RUFUS PERCIVAL RANNEY.**



RUFUS PERCIVAL RANNEY

From a photograph by **Weider** taken when Judge Ranney was about sixty-five years of age.







# RUFUS PERCIVAL RANNEY.

1813-1891.

BY

EDWIN JAY BLANDIN,

*of the Ohio Bar.*

**A**MONG the great lawyers who adorned the profession and the bench of Ohio during the half century dating back from 1890, it is not invidious to say that Judge Rufus P. Ranney was the greatest. He was distinctively a lawyer, and his life work and his renown are peculiarly linked with the profession of which he was a master. But he was a great man; and his labors and achievements in the profession furnish abundant evidence, that had he been tasked with the labors of administration, statesmanship or authorship, he was equipped with the talents that would have won for him in these capacities a success no less brilliant than that which was his in the profession.

His early life and training among the pioneers of Ohio, the rugged experiences he encountered and the knowledge he thus obtained of the people and his thorough sympathy with them, had much to do with forming his principles and contributing to his success.

He was born October 30th, 1813, in Hampden County, Massachusetts. When he was eleven years old he removed with his father to what is now Freedom, in Portage County, Ohio, where his father continued the work of farming which he had pursued in Massachusetts. His home was the homely log house of the early settler, surrounded by forests. There were no roads, few schools or churches. They endured many privations, and the energies of the whole family were devoted for the time, to obtaining food and clothing. The necessity of clearing the timber from the farm permitted young Ranney but one winter's schooling in six years. His determination to have an education his father sympathized with, but he could afford no assistance to that end. Rufus succeeded in securing enough instruction to fit him for Western Reserve College at Hudson, where for about a year he was a student, supporting himself by manual labor and teaching. In after life he used to tell of his first appearance at college in a suit of homespun, butternut-colored, which exposed the sacrifices and the difficulties which attended his early efforts to secure an education.

In the spring of 1834 he left college and commenced the study of law with Joshua R. Giddings and Benjamin F. Wade, in Ashtabula County. Surely his preparation for the study of law had been a hard, and at times a bitter experience. But he had become acquainted with the common people, their methods of thought and their honesty of purpose,



and he had been forced to a complete dependence upon himself, and to the habit of reaching conclusions without books or the advice of friends. The influence of these adverse circumstances, and these associations, was plainly apparent in his subsequent life. After two and a half years of study, he was admitted to the bar of the Supreme Court, in 1836, and commenced practice in Warren, Trumbull County, Ohio. Early in the following year the partnership between Giddings and Wade was dissolved and Ranney became Wade's partner. The firm of Wade & Ranney had an extensive business for about ten years. Wade being then elected to the Common Pleas bench, Ranney continued to practice alone till 1850. In the meantime he made Warren his home again, and married a daughter of Jonathan Warner.

Both Wade and Ranney were ardent politicians, but were not harmonious in their political opinions. Ranney was a Democrat of the old-fashioned type and believed in Jefferson and Jackson. His party admired him, trusted him, and frequently made him its candidate for office; but as he lived in a section of the state where his party was in a hopeless minority, even his ability and popularity could not save it from defeat. He found time to make up, to considerable extent, the deficiency in his early education. Accident and taste combined to direct his attention particularly to the language of France and when he could read it readily, he made a profound study of her literature, policies, history and law. The civic

law, and the debates which resulted in the Code Napoleon became as familiar to him as the commentaries of Blackstone and had their part in forming his clear ideas of natural justice and public policy.<sup>1</sup>

<sup>1</sup> The following letter written by Judge Ranney to a friend, in 1878, will be read with interest by those who may not be already perfectly acquainted with the origin and preparation of the Code of Napoleon, and will show Judge Ranney's estimate of Napoleon and his influence upon the people and institutions of France:

"DEAR SIR:

My absence from home has prevented an earlier reply to your letter. Some years since I very attentively read two large volumes containing the reports and discussions upon the French Civil Code, in the various bodies to which the project was submitted in its process to final completion. You are probably aware that it originated in a decree of the Consuls in the year VIII (1799) by which several of the jurisconsults were charged to draw up and present to the Government the *projet* of a Civil Code, which was done within the seven months of their appointment. It was then sent to all the individual tribunals in France, for examination by the Judges, and a return of such observations upon its various provisions as seemed to them proper. In this condition it came before the Council of State, a constituent part of the legislative power, charged with the duty of framing all enactments before they could be submitted to the *Corps Legislatif*. Here it received, both in the legislative section of the Council, and in the unit-body (to which was added the jurisconsults who had framed the *projet*), the most careful examination, section by section, and was subjected to a discussion which might well constitute a model for deliberative bodies. When thus perfected it was sent to the *Corps Legislatif*; but by the constitution then in force, it could not be immediately voted upon by that body, but must go to the Tribunal where it was again discussed, and returned with such suggestions and amendments as they thought proper. No discussion was permitted in the *Corps Legislatif*, but before voting, by ballot, upon each of the thirty-six divisions of the Code, that body heard at length the reasons upon which the Council of State and the Tribunal had acted, from very able reporters sent from each to represent their views. A production so much discussed and so materially considered, cannot be said to be the work of any one man, or of any one of the bodies through which it passed; but

In 1850 he was elected a member of the convention called to revise the Constitution of Ohio. In March, 1851, he was elected by the Legislature a

as a whole it has always been regarded as a very great success, and when the great diversities of customary law, previously existing in the different French departments is considered, the harmonious blending of these customs with the principles of the Roman Civil law, and those inaugurated by the Great Revolution, and out of the whole evolving a uniform system of enlightened jurisprudence, destined to endure much longer than the most brilliant military achievements of Napoleon, must be deemed a great civic triumph.

In the Council of State, over which Napoleon as first consul presided, he spoke very often, briefly, but always to the point; and he suffers nothing in comparison with the very first jurisconsults in France. Of course, his education did not permit him to enrich his remarks with reference to the vast reservoirs of juridical learning; but for a clear comprehension of the questions at issue no one excelled him, and in ability to hold the council to the very *gist* of the matter in hand, he had no equal.

The Code, therefore, constitutes one of his just titles to renown. He originated it, and his vast power and popularity carried it through. He contributed his full share to make it the admirable system of jurisprudence that it is; and if it cannot be truly said, that his qualifications for civil administration were equal to his unsurpassed military genius, yet, I think it no exaggeration to say, that in both respects he deserved to be ranked amongst the first characters in history.

In one direction, this sober, painstaking and accurate work displays him as vividly as the narrative of the brilliant campaign of Marengo, which immediately preceded this undertaking; and in both, as on many other occasions, the world has seen exhibited that penetrating genius, sound judgment and prompt decision, which so eminently characterizes the man; and above all that wonderful influence over men, which enabled him to bring to his aid the unrelenting energies of those best qualified for any given undertaking, without which great results are never attainable.

I wish I could inform you where the work could be found, that you might read it for yourself, but I am not aware that it was ever translated or published in this country, although it may have been.

Very truly yours,

Nov. 16, 1878.

(Signed) RUFUS P. RANNEY."

judge of the Supreme Court of Ohio, to succeed Judge Avery, who had resigned. The new Constitution took effect September 1st, 1851, and at the election in October of that year Judge Ranney was chosen by the people to become one of the judges of the new Supreme Court of Ohio. In assigning their terms by lot, he drew the longest term, five years, and served until 1856, when he resigned and removed to Cleveland where he resumed the practice of his profession as a member of the firm of Ranney, Backus & Noble. He was appointed United States district-attorney, but resigned at the end of a few months. In 1859 he was the unsuccessful candidate of his party against William Dennison for the office of governor. Three years afterward the Democrats were unexpectedly successful in electing their state ticket, and he found himself again a member of the Supreme Court, much against his wishes as it was his desire that his partner, Franklin T. Backus, who was the candidate of the Republicans, should have the position. He retained the office but two years and again resigned, and returned to his home and practice in Cleveland.

The result of his work on the bench of the Supreme Court was, that he found it impossible to answer all the demands that were made upon him for his services. If he had indulged a selfish regard for his own financial interests, he would have selected for his attention only the important and lucrative business that was offered him; but this he did not

do. The needs of a meritorious man or woman in distress were more likely to secure his devoted services than the prospect or offer of a large fee. But he was forced to take such business, in character and amount as to secure to him a sufficient fortune.

The well-earned leisure of his later years was far from being passed in indolence. He loved his friends and his books, and if he had needed any inducement to continue his reading and study, he would have found it in the pleasure it gave him to share the results of his study with others. Towards the close of his life he gradually withdrew from the practice of his profession, but the urgent solicitation of some old friends, or an attack upon some important principle, drew him occasionally from his library to the court room; and the announcement that Judge Ranney was to make an argument, never failed to bring together an audience of lawyers eager to hear and to learn from him the art of reasoning of which he was the consummate and acknowledged master, and he always charmed by his familiarity and sympathy with the most recent advances in the science of jurisprudence. The severity of his logic in argument was illustrated by a remark of one of the brilliant leaders of the Cleveland bar, who was associated with an able, but younger member of the bar in a case against Ranney. The younger man had fully examined the authorities upon the point involved in the case, and then said to his senior associate, "I can concede all of Ranney's premises and

then overwhelm him with authorities." His more experienced associate remarked, "Young man, let me tell you, that no man can concede Ranney's premises, and win. Conceding his premises no man can withstand his logic." His own experience made him anxious that young men should have educational advantages, and it was the double purpose of aiding to provide such advantages, and justifying the confidence which had been reposed in him by a valued client and friend, that induced him to devote a large amount of time for several years to placing the Case School of Applied Science upon a firm and successful foundation, and giving it adequate buildings and equipment. From this hasty view of the life and career of Judge Ranney, it is not difficult to comprehend, that when death came to him on the 6th of December, 1891, there united with his family a host of his friends, his associates at the bar, and the multitude who had profited and been made better by his labors and his services, in mourning an inestimable loss to his profession and to the world.

In argument, strength, clearness and logic were characteristic of Ranney. In his addresses there was no attempt at the picturesque, nothing dramatic, no declamation, no poetic flights, neither was there anything superfluous or frivolous. He spoke in a voice naturally soft and agreeable, but in a conversational tone. The matter of his speech was the business in hand. He made you feel that he began at the very beginning of his subject, he followed it in

natural order, step by step, to its conclusion, omitting nothing, and then he had finished. His sentences, as they fell from his lips, were specimens of faultless composition, and his clearness and accuracy of statement never left a doubt of his precise meaning. It would be impossible to amend his utterances by elaboration, by abridgment or by substitution, so as to add force or clearness to them. His arguments were happily characterized by another eminent lawyer and orator who had often listened to him, as being always constructed upon a foundation that no one could question, by piling one perfect block of granite upon another, until the whole argument stood out like a monument against the sky.

In the convention called in 1850 to revise the Constitution of Ohio, Ranney was a member from the Counties of Trumbull and Geauga. He was then thirty-six years old, but at once took a high rank as a member of the convention in which were included as members many of the leading lawyers and judges of the state. He was made a member of the committee on the judicial department, chairman of the committee on future amendments to the Constitution, and chairman of the committee on revision, enrollment and arrangement. On the first named committee he was associated with Kennan, Swan, Stanberry and Grosbeck—men illustrious in the profession of Ohio. On these committees, and, indeed, throughout the debates in the convention, he was untiring and vigilant in his efforts to secure the enactment of these pro-

visions which he deemed necessary to the liberty and welfare of the people. His course in the deliberations of the convention was largely the result of his intense and abiding belief in Democracy; not Democracy in a partisan sense, although that belief determined his party fealty also, but Democracy in the highest and best sense as meaning government by the people. He trusted the people thoroughly, and although the character of the voting population of the state gradually changed before his death, his faith in the people continued to be so strong that he looked forward to the outcome of every struggle in which both sides had a fair hearing, as sure to be wise and right. This confidence in, and anxiety for the welfare of the people was the key to his votes and speeches, and without understanding which they would be sadly misunderstood. He favored every proposition to limit the power of the Executive and of the Legislature, except as the duty of legislative action could be imposed upon the General Assembly to restrain encroachments upon the rights of citizens. His faith in the people led him to wish for them a larger share in the administration of justice, and to desire that every court should be to some extent a court of first instance, and he would have had every question of fact, in equity as well as at law, referred to a jury.

With such views he favored biennial sessions of the General Assembly. It was urged in favor of annual sessions that one of the principal means by



which the people had been able to secure, generation after generation, a portion of their rights under the British government was frequent elections and meeting of public bodies. But while he conceded this, his answer was that in England all power exercised by legislative bodies was taken from the Crown; here from the people. There the people could not fail to gain by legislative action; here they could not fail to lose.

He opposed the proposition to give the Governor a qualified veto, which was supported by the argument that it would prevent much ill-considered and hasty legislation. He admitted that hasty and inconsiderate legislation had been a sore evil but he differed from other delegates as to the cause. In his opinion it arose from the fact that the people of Ohio had heretofore delegated too much power to that body, especially the power of appointment to office, and the power of local government. The remedies he proposed were to take patronage away from the Legislature, to require important laws to be submitted to a direct vote of the people, to limit the legislative power to general laws for the government of civil conduct, and that all laws should receive a majority of the votes of both branches of the General Assembly by yeas and nays. The first and last two of these remedies were applied by the new Constitution with good results, but the second was so limited in its application as to serve no useful purpose. Indeed the Legislature found a way to avoid

the attempted limitation upon special laws, and the abuse continued to be a most grave evil, until the Supreme Court recently put it forever at rest, with the grateful thanks of all the good people of the state.

He supported with success an amendment to the report of the committee reducing the term of senators from four years to two years. He declared emphatically his opinion that the people should not delegate their power for any longer time than was necessary; that the Senate ought to be as popular as the House; that to say the Senate ought to "hang back and hang on" to save the people from themselves was a part of the old argument that the people were incapable of self-government. "He repudiated it," he said, "from his very soul. He had not one particle of sympathy for it, and it never could have any foundation whatever in his political creed."

The committee on the legislative department reported a section forbidding the General Assembly to pass retroactive laws, or laws impairing the obligations of contracts or their remedies. Ranney opposed the introduction of the words "or their remedies," but gave the remainder of the section his cordial and effective support. The provision against retroactive legislation was then a new Constitutional principle, the term "retroactive" being much more broad and comprehensive than the phrase *ex post facto* then in common use. It was urged by such able men as Judge Hitchcock that the power of re-

troactive legislation had been exercised beneficially, but Ranney pronounced it dangerous. In his judgment the power of curing errors, defects and omissions should be reposed in the courts; and so the Convention ultimately decided. His action in this respect, too, was in accord with his general policy of confining the Legislature to narrower limits than before. He considered that as men became more enlightened, the stringent laws required to protect the rights of individuals in an uncultivated state of society became unnecessary, and the legislative power should be limited and restrained in proportion.

He was the author of that clause in the Bill of Rights which provides that when private property is condemned the compensation therefor shall be assessed by a jury without deduction for benefits to any property of the owner. No one but himself could fully express his sense of disappointment when he found, some years later, that an entire street could be taken from the land of one person, and that such person could be required to return to the public the whole amount of compensation received, together with the cost of condemning his land, under the guise of a special assessment; but this conclusion was corrected in 1900, by a decision of the Supreme Court of Ohio, which vindicated Ranney's position and overruled the former case in which this error had been made.<sup>2</sup>

The committee on executive department recom-

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<sup>2</sup> 62 Ohio State Reports, 465.

mended that no one should be eligible to the office of governor, who should not have been a citizen of the United States twelve years, an inhabitant of this state five years next preceding his election, and have attained the age of thirty years, and that the salary of the Governor should be a fixed sum named in the Constitution. Ranney successfully opposed the recommendation as to eligibility, on the ground that the people should not be limited in the choice of their agents, and upon his motion it was provided that instead of naming a specific sum the Constitution should provide that the compensation of the Governor should be such sum as might be fixed by law, which should not be increased or diminished during his term of office.

It was Ranney who first proposed that the creditors of corporations should be secured by the individual liability of the stockholders. He insisted that the stockholders should be liable to the creditors of the corporation to the same extent that individuals or partners were liable for their individual or partnership debts, and he placed his advocacy of the proposition upon the ground, that to relieve them of their absolute liability to creditors merely because they had seen fit to conduct their private business under the form of a corporation instead of the form of a partnership or as an individual, was conferring a special privilege and immunity upon the members of a corporation which was contrary to sound principles, and a violation of the fundamental maxim

that in a free country, all persons should be equal before the law. He met strong opposition from many delegates, who, while they agreed with him that as an abstract principle, it was right that stockholders should be responsible for the debts of their corporations, yet they contended that it was impolitic so to provide in the Constitution, because it would check public improvements. Ranney so far yielded to this demand, as to put a modified liability upon the individual liability of stockholders in corporations designed to construct public improvements, hoping in that way to preserve the absolute liability of the stockholders to their creditors in strictly private corporations. The sarcasm with which he told them that if they bartered away their principles with the view of pushing forward prematurely works of public improvement, they were "making a most miserable swap of it," and the eloquence with which he denounced the abandonment of political principles in matters of legislation, have never ceased to be refreshing reading. He said:

If men choose to take the benefit of a corporate name and right of succession, the better to enable them to prosecute their own private business, the General Assembly could not relieve them from liabilities to which all other citizens were subject, of paying their debts to the full extent. . . . One of the most crying evils connected with corporate privileges was the exemption from individual liability for the payment of their debts. All associations of persons without a charter were held liable, in their private estates, for the payment of the last cent of their indebtedness. No matter whether they had lost all they embarked in the busi-

ness or not. If the ocean had swallowed up the goods of the merchant, or the drouth or frost had blighted the hopes of the farmer, still no exemption was found for them. But once clothed with corporate power — once shielded with the panoply of corporate privilege, all was changed. The stock subscribed once gone, no matter if five times the amount had been withdrawn in the shape of profits or dividends, all liability was gone. . . . He would confess that he looked upon their (corporations) introduction into all the departments of ordinary business, as calculated to depress private enterprise, and break down men of small capital who undertook to compete with them, thus destroying the private independence of our mechanics and business men, and compelling them to find employment under the overshadowing power and influence of associated wealth. . . . This great and increasing tendency to engulf every branch of business in the vortex of corporations must be met with the most prompt and energetic guaranties against their frauds, or they would be converted into the worst of all nuisances. . . . The people of the country would no longer suffer their statute book to be a standing libel upon the declaration of equality contained in the charter of their liberties. Equal rights to all, exclusive privileges to none, should and would become an operative, living principle, manifesting itself in all their laws and political institutions; a principle much more important to the happiness of the people to preserve unimpaired, than fostering prematurely the construction of great works of internal improvement. If either must languish, preserve the principle as a great bulwark of the many. If that is surrendered, everything that protects them against oppression is gone. The complaints of the people against corporations did not exist without the best of reasons. First they had exclusive privileges to engross the most lucrative kinds of business. Even the prerogative of government to coin money, had, in effect, been surrendered to them. The corporate power, and the money power, had joined hands. The people had been handed over to their tender mercies, and in effect the proceeds of their industry held at the caprice of

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monied corporations — money was made scarce or plenty, labor was well or ill rewarded, debtors were saved or ruined, as the interest or whim of these money kings dictated.

A spirited and earnest debate was had in the convention upon the question of giving the Legislature power to amend, alter or repeal all charters of corporations. Ranney favored the power of repeal, and the provisions became a part of the Constitution. The opposition contended that a charter or franchise was property, and that to repeal such franchise would be to take the property of the corporation without compensation. Ranney denied that the franchise of a corporation was property, and if it could be so considered, then in granting it, the state was giving to the corporation the property of the people, and that the power to give and to recall such franchises ought always to be within the control of the people or their representatives.

He contended that the worst enemies of corporations are those who would hang on to the power, by which they have always endeavored to drag something from the community not enjoyed by all. If corporations cannot exist without this — if franchises are to be taken and enjoyed by corporations at the expense of the rest of the community — if this is to be demonstrated to my mind — from that day forth, I wage an eternal and exterminating war against all corporations. I am for death and destruction to the whole of them. But I believe that the great principle of association can be maintained, that all the benefits to be derived from the legal identity of many persons, can be secured without being attended by this dangerous principle. If this can be done, then I am in favor of corporations; but if it cannot, then I am against them from the start. . . . If the remedy proposed

(reserving the right of repeal) should have the effect to discourage the process which has been so long going on, of shingling the state all over with corporations, engulfing all business in the hands of monopolies, thereby striking down the energies of private enterprise — I am neither a prophet, nor the son of a prophet, but I verily believe, that, fifty years hence, the men that shall stand in your places and possess this goodly land, will bless you for this day's work, if it shall have the effect of protecting individual men from the power of associated wealth. . . . I cannot subscribe to a bare legislative edict, making one portion of our fellow citizens rich, at the expense of the rest, and declare such an edict to be beyond the power not only of the Legislature, but of the people themselves to repeal.

He favored the reformation of civil procedure. His ideal of a lawyer was high. In his opinion no one could occupy a respectable position in the legal profession without a knowledge of law as a science, which could be attained only by the most assiduous labor and application. He wished the profession to be relieved of the miserable jargon and mystery of forms and technicalities, that it might be left to pursue the noble study of the rights of man, the rights of property and all the varied relations of life subject to legal regulations.

He took an active part in the discussions on education, the elective franchise, capital punishment to which he was opposed, to the levying of poll taxes to which he was also opposed, and finances and taxation. His views upon all these subjects were distinct and pronounced, although he did not always succeed in carrying the convention with him. How-



ever his work in the convention and that of those who acted with him had been so well done, that in the closing hour of the convention he had occasion to say that after a careful review of the whole instrument, of all its parts, of every line and word, he believed before God and man, that it was one of the best, if not the best of the Constitutions of American states; and if the people of Ohio were not well governed thereafter, it would be the fault of the people themselves, for the whole responsibility, then and thereafter, was upon them.

He and those who believed as he did, had succeeded in two great objects. Believing that all delegated power is liable to abuse, they had delegated as little as possible, and having little confidence in the legislative power as a source of safety or happiness for the people, they had not been contented to read homilies or to recommend propositions to the General Assembly, but had made the Constitution a body of laws, not only declaring fundamental principles, but prescribing so far as practicable the details necessary to carry them into effect.

He was far from being satisfied, however, with the judicial article, although he succeeded in securing material modifications of the plan proposed by the judiciary committee. He devoted his best thought to it, and gave more labor and attention to it than to any other part of the Constitution. His chief, and insuperable objection to it was that it removed the courts of last resort too far from the people. He

said that he "looked upon it as of great importance for any court to go out among the people, to learn their character, manners, habits and modes of thought. It would give them a species of information that they could obtain in no other way. Besides the effect upon the people will be in the highest degree salutary. For no court can acquire that power, dignity, influence and authority in the eyes of the people which it ought to have, unless it goes among the people, performs its duties in their sight and places in their view the practical workings of the system of judicial power which acts upon and protects their interests." A Supreme Court sitting exclusively at the capital, and which was a mere paper court, would, in his judgment, become but little better than mere papers themselves, and might as well be filed away in some secure place in the capitol. He made most vigorous objection to the system that required first the trial of cases in the *nisi prius* court and then suffered a retrial in an intermediate court, and a final trial in a court of last resort, as being unreasonably expensive to litigants, and causing delay that was often equivalent to the denial of justice.

The opinions of the Supreme Court rendered during Judge Ranney's term under the old Constitution are reported in the 20th volume of the Ohio Reports. Those rendered during his first term under the new Constitution are found in the first five volumes of the Ohio State Reports, and those during his last term, in the 14th and 15th Ohio State

Reports. The old Supreme Court, under the leadership of Judge Peter Hitchcock, was one of the ablest courts in the United States, and was acknowledged as such wherever the common law prevailed. It was remarkable for taking practical views of the law which were widely accepted and applied to a great variety of cases. Some of them will be noticed more particularly in connection with certain decisions, but are mentioned here for the purpose of adding that Judge Ranney found himself in thorough sympathy with them, as they satisfied at the same time his feeling of veneration for the principles of the common law and his love of justice.

One of his first opinions is an illustration of this. The owner of a judgment had accepted payment for about one-third of its amount, and one hundred dollars for attorney's fees, in satisfaction of the whole, and he refused to enter the satisfaction. The court recognized the existence of the rule that the payment of less than the sum due on a liquidated demand, although agreed to be received in full satisfaction, could not be insisted on as such for want of a valuable consideration. Judge Ranney in giving the opinion of the court would not set aside this rule; he had too much regard for well-settled principles. But he had no hesitation in pronouncing both the reason and the rule purely technical and said that there was nothing of principle left in the rule itself. He therefore held that the payment of one hundred dollars to the attorney instead of to the judgment

creditor, was a sufficient consideration to take the case out of the rule. He said:

I am aware that this is an exceedingly technical and unsatisfactory reason, but its justification is found in the fact that the plaintiff seeks to escape from his solemn engagement by which he has obtained money from the defendant by the aid of a technicality. To prevent the consummation of such a fraud he is met with technicalities nearly as absurd as that upon which he insists.

But while Judge Ranney followed, as he said, in the footsteps of the sages of the law, and justified his action by an array of authorities, one would greatly misjudge him if he supposed that such a technical rule would have been permitted to stand in the way of justice. He had the greatest respect for the most technical rules which rested upon the foundation of reason, but as he intimated in the case under consideration, he had little veneration for rules which had been effectually undermined, and was ready to overrule them at once and to place the matters to which they had reference upon the footing of reason and common sense.<sup>3</sup>

A somewhat different illustration of the view which the court took of the force of the English Common Law, which also shows the effect of his early life upon the formation of Judge Ranney's opinions, is found in his opinion on cattle running at large.<sup>4</sup> After holding that before any statutory

<sup>3</sup> Harper vs. Graham, 20 Ohio Reports, 106.

<sup>4</sup> Railroad Company vs. Waterson, 4 Ohio State Reports, 424.

inhibition the owner of domestic animals was not at fault in suffering them to run at large, he said:

I am aware, that this is flatly opposed to the common-law doctrine upon the subject, and if that rule of the common law was in force in this state, would be entirely inadmissible. But it is not in force; and it is not in force because, in addition to being utterly inconsistent with our legislation, it lacks all the essential requisities that give vitality to any principle of the common law, and is opposed to the common understanding, habits, and even necessities, of the people of the state. Indeed, with the strict enforcement of such a rule, the state never could have been settled. The lands were all heavily timbered, and the introduction of domestic animals, from the scarcity of herbage, requiring a wide range for their support, became indispensable before the forests could be removed. It would have been a novel proposition to a hardy pioneer, when he listened in the morning for the bell that indicated where the oxen that hauled together his logs for burning, might be found, to have told him that his cattle were trespassers, on every other man's unenclosed land upon which they might have fed during the night; or that he could plant corn without enclosing the ground, and sue his neighbor whose cattle had eaten it up.

Another of the many cases in which the desire to do justice was such a paramount consideration with him that technical rules of the common law were not permitted to stand in the way of its application was that of *Hollister vs. Dillon*.<sup>5</sup> A mortgage debtor had taken a personal judgment for his debt, and at the sale of the mortgaged premises on execution had purchased them himself in ignorance of the fact that the mortgage debtor had conveyed them be-

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<sup>5</sup>4 Ohio State Reports, 197.

fore the sale to a third person. Of course it was insisted by counsel in the foreclosure proceedings which were afterwards brought, that the debt was merged in the judgment, and the judgment satisfied by the sale, and that the purchaser took all risks under the operation of the maxim *caveat emptor*. Judge Ranney admitted that the fact that exact justice cannot be done in every case, is in no way decisive against the soundness of a general principle; that if it is productive of general convenience and simplicity, and in most cases adapts itself to the business and intercourse of men in society, it needs but very little experience to see that upon the whole it is salutary and ought not to be impaired by engrafting numerous exceptions upon it. But well-founded distinctions never escaped his acute observation, and he had no difficulty in discovering that no rule of law made the proceedings on the judgment a bar to the remedy by foreclosure. He said:

When the jurisdiction of a court of equity is established, and its duty to hear and determine is unquestioned, it looks only to the substance of transactions and is never embarrassed by the forms or complications in which they may be involved. . . . To call the mistaken proceeding in the Circuit Court in which nothing was accomplished and nothing obtained in *reality*, a payment of the debt, is in the face of common sense; and to permit it to operate as such, not for the benefit of the debtor even, but for those who have purchased his interest subject to the payment of the debt, and without paying, would hold the property without consideration, is to shock the moral sense.

One characteristic of the old Supreme Court was

its disposition to sustain the title of occupants of land under generally acknowledged titles, whether strictly legal or not, as against those who sought to gain possession under technical rights after the lapse of years. One may search the earlier records in vain for any encouragement to such attacks. The tendency of the court in Judge Ranney's time is shown by his opinion in *Lessee of Blake vs. Davis*.<sup>6</sup> The title of the plaintiff came from a married woman. The title of the defendant came through an administrator's sale, which had no validity. An allotment had been made by the trustees of the district known as the Ohio Company's Purchase, and the plaintiff claimed that the woman who was his grantor was entitled to the benefit of the presumption that a deed had been delivered in pursuance of the allotment. The court conceded that the claim was well founded if the plaintiff was in a position to avail himself of it; but after a careful review of all the authorities Judge Ranney said that the whole doctrine rested upon the idea that titles and possessions are to be quieted, not disturbed, by it; that right and justice are protected in its application, not injured; in short, that it is only what ought to be done that can be considered as done. Referring to the plaintiff's grantor he added:

She has no legal advantage, but now seeks, by presumptions, to get it. To get it, she must present an honest, not a technical case. She cannot, in honesty, take this land from the occupants, while her father's estate was relieved with the very money that

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<sup>6</sup> 20 Ohio Reports, 231.

paid for it, and when she has acquiesced in the action of the administrator for more than half a century. I know it is said that she is a married woman; but I have yet to learn that even married women have a *right to do wrong*. We take from her none of her rights—we only prevent her from taking the rights of others.

The habit of mind which was manifested in great respect for titles to land acquired by long possession under well-recognized titles was shown in an equal respect for decisions of courts which have become rules of property. He said:

It is very evident<sup>7</sup> that the simplest justice to our predecessors as well as the public, should prevent us from interfering with decisions deliberately made, merely because a difference of opinion might exist between them and us upon a doubtful and difficult question of construction. But when, as in this case, the decision has relation to large amounts of a species of property which assumes a value in the market, changes hands, and is dealt with upon the confidence reposed in the correctness of the decision of the highest judicial tribunal in the State; nothing short of the most urgent necessity to prevent injustice, or vindicate clear and obvious principles of law, would justify us in departing from it.

Again referring to the decisions of the Supreme Court in favor of purchasers at administration sales, that actual service upon the minor heir is not necessary, he said:<sup>8</sup>

These decisions have stood as the law of the state for more than twenty years. During all that time they have constituted rules of property, and upon the faith of them, men have invested their money. If ever an urgent case for the application of the

<sup>7</sup> Kearny vs. Buttles, 1 Ohio State Reports, 362.

<sup>8</sup> Sheldon vs. Newton, 3 Ohio State Reports, 494.



maxim, *stare decisis*, existed, this is one. It is not enough that we should doubt their correctness, or that we should decide differently, if the question was now, for the first time present. It must be made to appear clearly and unquestionably, that the rules of law have been violated, and the rights of the parties disregarded, before we could justify ourselves in questioning their authority.

No one was more competent than Judge Ranney to deal with the practical questions which had to be settled by the application of the rules of law to the changing conditions incident to the rapid development of a new country and the introduction of new methods of trade and transportation. Acting upon the well-settled principle that contracts in restraint of trade are void when general, but may be enforced when the restraint is partial, reasonable and not oppressive, and founded upon a valuable consideration, he settled the law for Ohio, that a covenant not to sell or manufacture in the United States or a state, was void, but might be very properly extended to a whole county, if the other requisites to its validity should exist.<sup>9</sup> Such a rule is in its nature more or less arbitrary, but this has been found to afford a fair protection to the interests of the party in favor of whom the restraint exists, and not to interfere with the interests of the public; and it has been accepted by courts of other states as a practical guide in determining the validity of contracts in restraint of trade.

<sup>9</sup> *Lange vs. Werk*, 2 Ohio State Reports, 519; *Thomas vs. Miles*, 3 Ohio State Reports, 274.

Upon Judge Ranney devolved the duty of defining authoritatively the liability of common carriers, who undertake to relieve themselves of their common law liability by special contract.<sup>10</sup> Of course he rested his conclusions upon a clear statement of the underlying principle. We are accustomed to say very glibly that it is against public policy to relieve a common carrier from the consequences of his own fault, but no one would ever be at a loss to tell why it was against public policy if he would become acquainted with the whole opinion from which the following is a brief quotation:

There is nothing in which the public have a deeper interest, than the careful and prudent management of public conveyances, and no higher moral obligation, than rests upon those intrusted with the control of dangerous forces, to discharge their duties with care and skill. Upon it the safety of thousands of lives, and millions of property, daily depends. Now, one of the strongest motives for the faithful performance of these duties, is found in the pecuniary responsibility which the carrier incurs for the failure. It induces him to furnish safe and suitable equipments, and to employ careful and competent agents. A contract, therefore, with one to relieve him from any part of this responsibility, reaches beyond the person with whom he contracts, and affects all who place their persons or property in his custody. It is immoral, because it diminishes the motives for the performance of a high moral duty; and it is against public policy, because it takes from the public a part of the security they would otherwise have.

Reviewing the authorities in England and America, he pronounced the opinion that settled the

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<sup>10</sup> *Graham vs. Davis*, 4 Ohio State Reports, 362.

rule for Ohio, that the transfer of a negotiable promissory note secured by mortgage on real estate to a *bona fide* indorsee, does not entitle the holder to foreclose the mortgage when it appears that both note and mortgage were obtained by fraud.<sup>11</sup> He said:

Mortgages are not necessities of commerce; they have none of the "attributes of money;" they do not pass in currency in the ordinary course of business, nor do any of the prompt and decisive rules of the law merchant apply to them. They are "securities" or "documents for debts," used for the purposes of *investment*, and unavoidably requiring from those who would take them with prudence and safety, an inquiry into the value, condition and title of the property upon which they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defense, before a court will foreclose his right to defend against those which have been obtained by force or fraud.

It is difficult, if not impossible to escape from the logic of this able opinion, although it has not been uniformly followed by the courts of some of the other states. The reasoning by which the judgment of the court was supported is so eminently satisfactory and conclusive that it would, doubtless, have made but little difference to the court that pronounced it, that their conclusion was not concurred in by the courts of some of their sister states and even by the Supreme Court of the United States.

The leading case of *Greenough vs. Smead*<sup>12</sup> de-

<sup>11</sup> *Baily vs. Smith*, 14 Ohio State Reports, 396.

<sup>12</sup> 3 Ohio State Reports, 415.

terminated the rights and liabilities of parties to negotiable paper in an opinion of singular clearness and force pronounced by Judge Ranney, and although he reached conclusions at variance with the courts of some of the other states, yet the rule announced has met the approval of the people and the public, because it gave full effect to the obligations of the parties consistently with the common understanding of business men.

Perhaps the decision of most far-reaching influence and importance in every-day practical affairs which he ever delivered, was in the case of *Railroad vs. Keary*.<sup>13</sup>

In the case of *Railroad Company vs. Stevens*<sup>14</sup> the court consisting of Chief-Justice Hitchcock and Judges Spalding, Caldwell and Ranney, had decided that when an employer placed one person in his employment under the direction and control of another also in his employment, such employer is liable for injury to the person of the servant placed in the subordinate position, caused by the negligence of his superior. The opinion given by Judge Caldwell was far from elaborate, and was admitted to be opposed to two decisions which were the only authorities mentioned. The Chief-Justice agreed in the results upon grounds different from those stated in Judge Caldwell's opinion, while Judge Spalding recorded a long and vigorous dissenting opinion. The

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<sup>13</sup> 3 Ohio State Reports, 201.

<sup>14</sup> 20 Ohio Reports, 415.

result was that the decision was not accepted by the legal profession as the final determination of the question, and three years afterward Judge Ranney, in *Railroad vs. Keary*, stated that the court had therefore carefully examined the grounds upon which it was placed and authorized him to declare their unanimous opinion that the rule laid down met their unqualified approval. The proposition upon which the conclusion rested was this:

No one has the right to put in operation forces calculated to endanger life and property, without placing them under the control of a competent, and ever active superintending intelligence. Whether he undertakes it, or procurs another to represent him, the obligation remains the same, and a failure to comply with it in either case, imposes the duty of making reparation for any injury that may ensue.

Not only were the reasons for the application of the legal proposition to the case fully stated, but the proposition itself was deduced from foundation principles of the common law, which, as Judge Ranney often said, had been so built up from the experience of ages, constantly adapting itself to the business and relations of men in society, that we seldom fail to find principles, which, if carried to legitimate results, are not altogether sufficient to settle every controversy. Since that decision there has been no doubt about the law of Ohio on the question then determined. It has been attacked and repudiated elsewhere, but those who have watched the progress of jurisprudence cannot fail to see how the courts of other states and the federal courts, as well, are com-

ing upon the ground taken by the Supreme Court of Ohio in 1854.

It became his duty to take part in those conflicts as to jurisdiction which occupied so much of the attention of the federal and state courts at various times prior to the close of the Civil War. He was impressed with the importance of preserving the dignity and authority of the state, and bold in asserting and maintaining it; but he was too good a lawyer and too just, to engage in any unreasonable or unseemly quarrel. This is shown by his action in respect to the water-craft law. Several of the District Courts of the United States had assumed the position that in the exercise of their admiralty powers they were authorized to seize upon and take into their possession vessels held by state officers under process issued from the common law courts. In accordance with that position a steamboat which had been seized under the water-craft law and was in the actual possession of the sheriff was taken by the marshal and the possession was surrendered to him. The Supreme Court held that the sheriff was liable for surrendering the vessel.<sup>15</sup> Judge Ranney announced the opinion of the court in the case, saying: "The Constitution of the United States and the laws made in pursuance thereof *we know*, and are glad to acknowledge, are the supreme laws of the land; the mistake consists in supposing them to be the only supreme laws of the land." Then followed a mas-

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<sup>15</sup> Keating vs. Spink, 3 Ohio State Reports, 105.

terly statement of the mutual relations of the federal and state laws, from which he had no hesitation in drawing the conclusion that the principle which the counsel for the sheriff sought to establish was so degrading to the state governments, and so utterly destructive of their ability to discharge the important functions for which they were instituted, that they had no warrant in the language, history or purpose of the Federal Constitution of the United States. This was in 1853; and was soon after cited with approval by the United States Court. About two years afterward the Ohio Supreme Court took another step in the same direction and held that the court making the first seizure retained a lien upon the craft for the benefit of the plaintiff as against all prior creditors making subsequent seizure, although the craft had been discharged upon bond being given.<sup>16</sup> In 1863 the court was asked to go still farther and declare that a sale made for debts contracted after the discharge of the craft was a nullity; but this the court declined to do, Judge Ranney saying that "wherever and whenever a ship floats upon the waters described in the statute, she carries her capacities and responsibilities with her, and is liable to be seized and sold by any court of competent jurisdiction for any liability she may have incurred not fixed and determined by previous seizure."<sup>17</sup>

Thus he assisted in promoting good faith, mutual

<sup>16</sup> *Raymond vs. Whitney*, 5 Ohio State Reports, 201.

<sup>17</sup> *Van Valkenburg vs. Kingsbury*, 14 Ohio State Reports, 353.

confidence and sound principles, which, as he said "must lie at the foundation of all comity between independent tribunals."

Undoubtedly the greatest service which Judge Ranney rendered the state while a member of the Supreme Court, was in placing a construction upon important provisions of the Constitution which he had done so much to form. The position was somewhat peculiar because the court was called upon to construe the old Constitution after the new Constitution had gone into effect; but he foresaw that the construction of the new Constitution was to be largely controlled by the application of general principles, and therefore, when he found it necessary to determine whether a county subscription to a railroad company was valid,<sup>18</sup> he took care to state what he believed to be the true principles of interpretation in such a way that their meaning could not be questioned. Confident that if adhered to, results of permanent benefit to the people would be achieved, he insisted then, as he insisted very many times afterward, upon giving the utmost force to the cardinal principle that all political power resides with the people. Therefore he said:

But, the authority of the General Assembly is much too broadly stated, when it is claimed that all their acts must be regarded as valid, which are not expressly prohibited by the Constitution. . . . The General Assembly, like the other departments of

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<sup>18</sup> *Railroad Company vs. Commissioners of Clinton County*, 1 Ohio State Reports, 77.



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government, exercises only delegated authority, it cannot be doubted, that any act passed by it, not fairly within the scope of legislative power, is as clearly void as though expressly prohibited.

Again and again and in many forms he reiterated this statement in his speeches in the Constitutional Convention and in his judicial opinions. He never lost sight of it and never tired of it. By it he tried every law when its validity was questioned.

This led him to conclusions in cases brought against the banks incorporated under the law of 1845, in which the Supreme Court of the United States did not concur.<sup>19</sup> That act provided that certain sums set off to the state by the banks should be in lieu of all taxes. It was contended that this constituted a contract between the state and the banks; and Judge Ranney, falling back on his political axiom that political sovereignty exists only with the people, and that the General Assembly exercises only delegated powers and limited authority, held that legislative power over the right of taxation was only as broad as the necessity for its employment and was denied where it might be used as a weapon of offense to subvert the government or to invade other fundamental rights; and that every surrender of the right to tax particular property, not only tends to paralyze the government, but involves a direct invasion of the rights of the holders of other property since deficiencies thus created must be made

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<sup>19</sup> *Debolt vs. Ohio Life Insurance and Trust Company*, 1 Ohio State Reports, 563.

up by larger contributions from them to meet the public demand, and therefore that no contract within the meaning of the Constitution, touching the right of taxation, could have been made by the act of 1845 whatever its language may have been. His disappointment must have been very keen when the Supreme Court of the United States reversed the judgments supported by this opinion, but he did not cease to be guided by the fundamental principle involved in it, because in a particular instance its appreciation was denied by a higher authority than his own.

During the last session of the Legislature under the old Constitution, many laws had been passed authorizing subscriptions to railroads and other public improvements, but the subscriptions themselves had not been made until after the new Constitution had gone into effect; and it was contended that such subscriptions were void as they certainly would have been if the enabling law had been passed after September 1st, 1851. A majority of the Supreme Court held the subscriptions valid.<sup>20</sup> Large subscriptions had been made to works not yet completed. The subscribers were not individuals alone, but also counties, cities, towns and villages that subscribed under the belief that the laws would continue in force, and that other municipalities would also subscribe. Upon the making of such further subscriptions depended probably the completion of the works and

<sup>20</sup> *Cass vs. Dillon*, 2 Ohio State Reports, 607.

the remuneration of the stockholders. To cut off such subscriptions would be to stop the enterprise and sink sums expended. Besides, by means of such subscriptions certain roads had been made and portions of the state had been largely benefited; to take from other portions the like means after they had been authorized, would seem somewhat like oppression; and it would look, also, like favoring the finished roads by crippling those that were uncompleted. These considerations are all referred to in the opinion of the court, not as influencing its opinion, but as having influenced the Constitutional Convention. Judges so often assure us that such considerations have no weight with them, that we are obliged to take them at their word; it is very certain, at any rate, that if Judge Ranney's judgment was affected by anything outside of the words of the Constitution, it was not by such considerations as these, but by his visions of the future, in which he saw enterprises of premature conception and doubtful expediency passing into the hands of preferred creditors, the stock sunk, and counties, cities and towns left to pay up their indebtedness by the most oppressive taxation; or, still worse, repudiating their obligation, notwithstanding the disgrace, corruption of public morals, and great individual loss sure to result from such a course. He delivered a long and very able dissenting opinion. The style was clear, the logic simple and, as will appear, apparently unanswerable. He said:

With the fact confessed that if this very law had been copied and passed since the first day of September, 1851, it would have been entirely inconsistent with the Constitution, and therefore a nullity; the conclusion, unaccountable to me, is reached that it may still continue in force and be executed after that time quite consistently with that same Constitution, although it demonstrably authorizes the same liability to be incurred, the same burdens imposed, the same taxes levied, and the same corrupt intermingling of public and corporate interests in either case. I will not say that of two laws having the same object and couched in the same language, the one may be consistent and the other, at the same time, inconsistent with the same Constitution; but I can with truth say that such a result is beyond my comprehension.

This opinion by Judge Ranney could hardly fail to-day to meet the approval of the legal profession. Indeed the Supreme Court ten years later intimated very strongly that it met their approval although they could not follow it in view of the consequences which would probably result from its adoption after long acquiescence in the decision of the majority.

Judge Ranney was called upon more frequently than any other member of the court to express the opinion of the majority upon constitutional questions. He delivered the opinion declaring so much of the act as provided a jury of six men in criminal cases in the Probate Court unconstitutional. The Constitution is silent as to the number of persons required to form a jury, but it was his judgment that the essential and distinguishing features of a trial by jury, as known at the common law, and generally, if not universally adopted in this country, were intended to be preserved, and its benefits secured to the ac-

cused in criminal cases; and that it was beyond the power of the General Assembly to impair the right or materially to change its character; and that the number of the jurors could not be diminished or a verdict authorized short of the unanimous concurrence of all the jurors.<sup>21</sup>

He announced the judgment of the court in *Hill vs. Higdon*,<sup>22</sup> that cities and villages might levy special assessments, as distinguished from taxes, upon real estate peculiarly and specially benefited; that where taxation is spoken of in the second section of the Twelfth Article of the Constitution, reference is made to the general burdens imposed for the purpose of supporting the government, and the revenue thereby is expended for the equal benefit of the public at large; while the power of assessment referred to in the sixth section of the Thirteenth Article, although resting upon the taxing power, was intended by the Framers of the Constitution to describe a distinct and well-known mode of laying a local burden upon particular property with reference to the peculiar and special benefit to such property arising from the expenditure of the money.

The rights of street railways in the public highways of the state, and the limitations upon those rights, pointing out where the rights of the public end and those of the abutting property owners begin, were stated and explained by him in the case of *Street*

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<sup>21</sup> *Work vs. The State*, 2 Ohio State Reports, 296.

<sup>22</sup> 5 Ohio State Reports, 243.

Railway vs. Cumminsville<sup>23</sup> together with the constitutional principles governing each, in an opinion of singular clearness, and enforcing those principles with simple logic and force which has made that case a guide to the determination of subsequent cases, so that it has probably been cited and followed in more cases than any other ever reported by the Supreme Court.

He defined the power of *eminent domain* as used in the appropriation of lands, traced it to its source as an inseparable incident of sovereignty; fixed the meaning of the word "necessity" as applied to condemnation proceedings, and expressed the final judgment of the court, that property taken for public use, whether with or without the intervention of a corporation, must be paid for at its full market value at the time it is taken, without any regard whatever to the causes that may have contributed to make up the value.<sup>24</sup>

In another important case Judge Ranney delivered a dissenting opinion so far as the Supreme Court was concerned; but his opinion was also the opinion of the great majority of that appellate court of the people which is the final arbiter, and the result shows how little permanent authority attaches to a mere statement of a proposition of law, even when stated by the Supreme Court, unless it meets with popular approval. The court held in *Exchange Bank vs.*

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<sup>23</sup> 14 Ohio State Reports, 523.

<sup>24</sup> Giesy vs. Railroad Company, 4 Ohio State Reports, 308.

Hines<sup>25</sup> that the law allowing taxpayers to ascertain the amount of their credits by deducting *bona fide* indebtedness was unconstitutional. Judge Ranney dissented. In giving his opinion he said:

*Credits* are, by the Constitution, to be taxed, and from the *gross* amount, each individual is, by this section, entitled to deduct his *bona fide* debts, and return the balance. The language of the law may not be strictly accurate. The evident meaning, however, is that debts may be deducted from the gross amount of notes, accounts, and other choses in action, belonging to the individual. If the balance thus ascertained, is not the precise amount and value of the *credits* of the party against the world, both in legal and popular sense, I confess myself unable to understand the meaning of words or force of language.

In closing his opinion he spoke of the probable consequences of the construction placed upon the Constitution by the majority as follows:

I especially fear its effects upon a large class of enterprising merchants and manufacturers, whose course of business compels them to purchase their stock, to a great extent, upon credit, and to extend a like credit to their customers. I feel very sure that it never could have been intended to lay unusual burdens upon a class of men who had contributed so largely to develop the resources and increase the wealth of the state.

The General Assembly, which represented the great body of citizens, declined to accept the decision of the court as law, and taxpayers have uniformly refused to act upon it, although it has since been approved by the court in another case. Even tax collectors ceased long ago to attempt the enforcement

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<sup>25</sup> 3 Ohio State Reports, 1.

of the decision, and at last the court itself saw the hopelessness of insisting upon it, so strong a man as Judge McIlvain saying in the case of *Payne vs. Waterson*:<sup>26</sup> "We do not propose to review the case of *Exchange Bank vs. Hines*, in which it was held by the majority of the court that the section which authorized the deduction of debts from moneys and credits was in conflict with the Constitution; it is true that the General Assembly has not acquiesced in the decision of the majority," and then quoting from the dissenting opinion of Judge Ranney the proposition upon which he rested his own decision, although upon that point what Judge Ranney had said was not a dissent, but represented the view of the court.

In 1863, the General Assembly of Ohio passed an act authorizing soldiers to vote in the field, where they might happen to be outside of the state, for the election of state and county officers. At an election certain officers were elected if these votes given outside of the state were counted, and if not counted, others were elected. The validity of these votes given outside the state was, therefore, called in question. The majority of the court held the votes valid, and Ranney dissented.<sup>27</sup> His opinion is a striking specimen of his clearness of conception of the principle involved and of the strength of the presentation of his views. He contended that an "election" pro-

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<sup>26</sup> 37 Ohio State Reports, 121.

<sup>27</sup> *Lehman vs. McBride*, 15 Ohio State Reports, 573.



vided for by the Constitution was an institution as well recognized under the old Constitution and the laws enacted under it, as the *habeas corpus* or trial by jury, and being required by the old Constitution and laws to be conducted in a prescribed election district at the time the new Constitution was adopted, the election provided for in the new Constitution was by implication required to be conducted in the election district fixed by law. Again, he insisted that elections were by the new Constitution required to be conducted according to law, and that as no act of the Legislature could operate or have effect outside of the state, any election had, or votes given beyond the limits of the state, were necessarily given without legal sanction and were void. That he sympathized fully with the sentiment that would give the soldiers in the field a voice in the election of the officials in the place of their residence, but that his sympathy did not influence his discharge of duty as a judge, is evidenced from his words. He said:

In thus stating my views, at much greater length than I had originally intended, upon some of the important questions involved in these cases, I have intended to confine myself to the legal bearings of the controversy alone. With the policy of this enactment, any further than its policy is involved in a proper construction of the Constitution, I have no concern. It will be a sad day for constitutional government, when legislative enactments are either sustained or overthrown, upon mere considerations of temporary policy or expediency.

It would have given me much greater pleasure to have been able to concur with the General Assembly, in the nearly or quite

unanimous votes by which this act was passed, than to be under the necessity of assigning the reasons which lead me to the conclusion that they have mistaken their constitutional powers. But my convictions are so unalterably fixed that I can not bring myself to that state of reasonable doubt even, upon which enactments are customarily saved. I have no doubt that this act, in so far as it substantially nullifies the express requirement of a previous residence, and undertakes to do, beyond the limits of the state, and *without* the force and authority of law, what is expressly required to be done within its limits, and by law, is inconsistent with both the letter and spirit of the Constitution; and, with these convictions, fidelity to the high trust with which I have been invested by the people, and the solemn oath I have taken to support the Constitution, equally require me so to declare.

I am not amongst those who believe that frequent and wide departures from the spirit and purposes of the fundamental law can be indulged in, and an easy and safe return be effected to that normal condition which makes the Constitution what it was designed to be, the guardian of free institutions, and of life, liberty and property.

The foregoing are but a few of many opinions which Judge Ranney delivered and a very small part of the decisions in which he took part as a member of the Supreme Court; but from what has been said it may be readily seen how deeply the people are indebted to his presence in their highest court at a critical period of the state's history, for the clear and authoritative statement and enforcement of those principles upon which the security of life, liberty and property depends. And it may also be seen how thoroughly he shared with those who stand most conspicuously in the history of the country as leaders,

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the firm belief that the ultimate and highest security for those inestimable blessings—a security upon which we may absolutely depend in the long run—rests not in executive officers, legislatures or courts, but in the people.<sup>28</sup>

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<sup>28</sup> “In the preparation of this article, I have freely used data and frequently the language in an address on Judge Ranney, delivered by the late Honorable S. E. Williamson, of Cleveland.”



**STEPHEN ARNOLD DOUGLAS.**

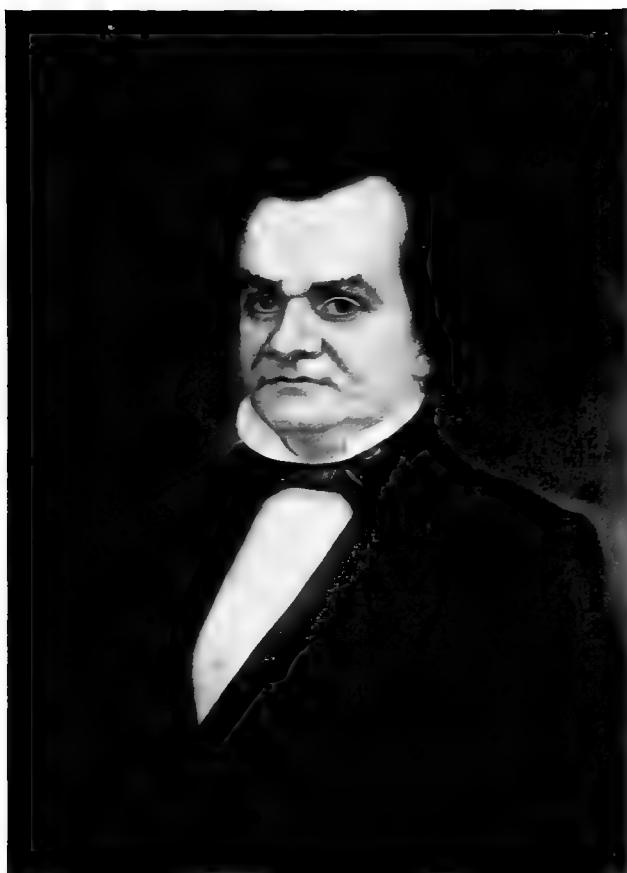


STEPHEN A. DOUGLAS

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# STEPHEN ARNOLD DOUGLAS.

1813-1861.

BY

EDWARD OSGOOD BROWN,

*Justice of the Illinois Appellate Court.*

ILLINOIS has furnished many great names to the roll of famous Americans. In every field of human endeavor she has had sons, native and adopted, who have been among the national leaders. Great judges and lawyers have not been wanting in the list. Some of her foremost sons were lawyers of eminence and distinction within her borders before they became central figures in our national and political history. This is true of Trumbull, of Lincoln, of Palmer and of many another. It was especially true of the subject of this sketch, Stephen Arnold Douglas.

From December, 1843, when John Quincy Adams in his diary made sneering mention of him as the "homunculus Douglas," and noted that on the occasion of his first speech in the House of Representatives he made a spectacle of himself very little to the liking of the polished and conventional ex-President, up to the time eighteen years later when at the age of forty-eight, he passed to the unseen

world with messages of patriotic advice to his countrymen and his children upon his lips, Douglas was constantly engaged in public affairs. His career as a lawyer was practically ended, therefore, at the age of thirty, save in the larger sense made true by the fact that matters of state polity are also matters of law in its broader meaning.

Yet distinguished as Senator Douglas' services to the country were for many years, remarkable as was his hold on the great party of which through a decade at least, in victory and defeat, he was the acknowledged leader, his service of but a few days over two years on the bench of the Supreme Court of Illinois, marked by hardly a score of reported opinions, made him not only through his life, but in the memory of his admirers and friends, always "Judge" Douglas.

Apart, then, even from the distinctive juridical tone and temper with which Stephen A. Douglas during his public life approached and treated many of the grave questions of statescraft, which were constantly pressed on him as a lawmaker and a political leader, this career, brief as it was, as a brilliant lawyer and an eminent judge, well merits for his name admission into the company into which this sketch introduces him.

Stephen Arnold Douglas was the son of a father of the same name—a physician in Brandon, Vermont. He was born April 23d, 1813. His mother's maiden name was Sarah Fisk, and both Doctor

Douglas and his wife were descended from the Arnolds of Rhode Island. Whatever his remote ancestry may have been, and from the name it is generally assumed to have been Scotch, the subject of this sketch was of as distinctive a New England ancestry as one who was not an American Indian could boast. His forbears were all of the Massachusetts Bay Colony and early settlers on Cape Ann. He had perhaps inherited from them the self-confidence, the energy and the very early developed ability to direct men and events which were also notable traits of many of the youth of that section of our sea coast in the early part of the nineteenth century. Before the infant Douglas was three months old his father died suddenly. His widowed mother then made her home with an unmarried brother on a farm near Brandon. At fifteen years of age young Douglas, who had up to that time been educated at "the little red school house" so familiar in rural New England, launched himself into the world to make his own living in his own way. For almost two years he worked at the trade of cabinet making at the neighboring town of Middlebury, but the work became too hard for his health, and moreover he wanted to go to school again. He therefore entered an academy at Brandon, one of those excellent secondary schools common in New York and in New England at that day, which in the education of many of their eminent sons filled to some extent the place which the more dignified and pretentious college

occupied in that of the more prosperous comrades of their youth. Douglas' handicraft work for two years, teaching him accuracy, attention and concentration, probably increased his power of application to books, his aptitude for study, and his diligence and attention.

Douglas made very rapid advancement in his studies during his year at the Brandon Academy. At its close his mother having married a Mr. Granger of Canandaigua, New York, he went with her to his stepfather's home, and entered for another year the Academy of Canandaigua. There he also began to study law in the office of resident attorneys. The law, however, even then was not so jealous a mistress of his affections but that he managed to elude her vigilance and flirt with her sister, politics, whose charms were in a few years to entice him altogether from his first love. The nineteen-year-old lad threw himself into the excitement of the presidential contest with enthusiasm. If he could not vote, he could talk, and talk he did in season and out of season, celebrating the virtues of his hero, Jackson, defending the bitterly-assailed measures of his first administration and championing his claims to reelection. Despite his aggressive self-confidence it can hardly be supposed that he anticipated that in less than twelve years thereafter the hero of New Orleans would personally thank him for a defense of the proclamation of martial law at New Orleans as better than he could have made for himself.

General Jackson was elected for the second time and for the second time had been inaugurated when his youthful admirer started for what was then the frontier west to seek his material, and push his political fortunes. He stopped for a short time in the growing city of Cleveland, and half determined to seek admittance to the bar of Ohio, but a malarial fever which almost consumed his slender resources made him unable to spend the necessary time of preparation without gainful employment, and so he again fared westward in search of work. Not finding it in Louisville or St. Louis, and influenced, it may be supposed, by the thought that he would probably find sympathetic companions among those who had named their new settlement in Illinois in honor of his and their political hero, he drifted to Jacksonville in Morgan County, Illinois, in November, 1833, not yet twenty-one years old, with thirty-seven cents only in his pocket and no other earthly possessions but the clothes upon his back and in his hands. When he again passed the eastern boundary of Illinois it was just ten years later, and he was on his way to take his seat in the Twenty-eighth Congress of the United States, to which he had been elected as a member of the House of Representatives. In that decade he had been State's Attorney, twice the candidate of the Democratic party for Congress, a nearly successful candidate for the Senate of the United States before the Legislature, a member of the Legislature of Illinois, the register of the United

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States Public Land Office at Springfield, Secretary of State of Illinois, and Judge of its Supreme Court.

Nor was it with pigmies that the Little Giant of Illinois, as he was already nicknamed by his followers, had measured himself in the struggle.

It would be hard to name a place and time in the United States where and when a more noteworthy set of young men were brought together than in the almost frontier, but rapidly growing and prospering Illinois of the decade between 1830 and 1840. As always, it was the more enterprising, ambitious and able who had emigrated from the older civilization to the newer, and the newer in this case was no longer wild and rough and dangerous, but it was unconventional, alert, and rapidly changing and developing. It was full of fresh, new and exuberant life.

To mention but a few of the men who were at once the close companions, friends and rivals of Mr. Douglas during the ten years that he was thus so rapidly advancing in leadership at the bar and in statecraft, there were E. D. Baker, afterward United States Senator from Oregon, the brilliant lawyer, statesman, orator and soldier who fell at Ball's Bluff; James Shields, who was to win laurels in the Mexican War, seats in the United States Senate from two states, and, as has been felicitously said, "the closest approach anybody ever won to a victory over Stonewall Jackson;" James A. McDougal, who was to die a Senator from California; John M. Palmer, to be Governor and Senator from Illinois; Lyman



Trumbull, to be Senator from Illinois for eighteen years; David Davis, Judge of United States Supreme Court and Senator thereafter; O. H. Browning, to be Senator and Secretary of the Interior; Sidney Breese, to be Douglas' colleague both on the bench and in the Senate; and greatest of all and most peculiarly a companion figure through many stirring years, the young Kentuckian, Abraham Lincoln. But it must not be supposed that by the names of these men destined to become of national and world-wide fame, the list of brilliant rivals among whom Douglas had to make his way in the central Illinois of the thirties, has been exhausted. If through the fortunes of war or politics, or their own deliberate choice, Stephen T. Logan, John J. Hardin, Edward G. Ryan, John A. McClernand, John D. Caton, Justin Butterfield, Samuel H. Treat and Gustavus Koerner (and the list might be very greatly increased), have a reputation less widely extended through participation in national affairs, their names nevertheless are known in the great Prairie State which they had much to do in advancing to the third Commonwealth of the Union, as those of men who in their ambitious youth, as in the later years when honors and eminence were given them, must have been no weak competitors in the race of life and in the profession which the young Douglas had chosen. But if the character and ability of his associates made the struggle strenuous, it doubtless inspired him for the contest. They lived together in small country

towns, they rode the circuit together over the broad and luxuriant prairies of Illinois, they ate and slept together, and according to the manners of the time and place, did not altogether shirk personal encounters with each other, if verbal disputes grew too warm. But although the intercourse of the lawyers with each other in these early days in Illinois certainly was wanting in formality and restraint, it did not generally lack dignity and seriousness of purpose, nor that sympathetic interest in each other's fortunes which Douglas in later days, when both men were famous, reminded Lincoln had subsisted between them when "both boys they were struggling with poverty in a strange land." In such associations the minds of those thrown together in the practice of law grow, by the clash and the friction, as well as by sympathetic intercourse and communication, alert and active, and "the whole lump is leavened."

To return to our stranded adventurer in Jacksonville in November, 1833. There was no work for him there, but he heard that at Winchester, a village on the prairie sixteen miles to the southwest, they needed a school teacher, and thither he pushed his way on foot. Fortunately a public vendue, an administrator's sale of a stock of goods, was going on in the public square the morning after he reached Winchester. His ready self-assertive way, his cordial and buoyant good humor—qualities, which with the attractive and really impressive appearance that, despite his diminutive stature, his handsome face and

massive head gave him—belonged to him through life, procured him, on his request, a place as clerk to the auctioneer for the three days' sale. Poor as he may have been at times after he earned this first six dollars as a resident of Illinois, he was never thereafter in want, nor without Illinois friends willing to spend and to be spent in his service. He seems to have taken full advantage, as was his custom ever after, of opportunity. He talked politics, with courtesy and good nature, with the crowd about him. He praised their farms and their skill and industry in conducting them. He pointed out their need of a school and asserted his peculiar qualifications for teaching it, and by the time the sale was over had earned not only his little stipend, but the good will of the entire neighborhood. A school was soon arranged for him and forty pupils entered for a term of three months at a tuition fee of three dollars each.

Money was scarce in Illinois in those days and prices low. We can hardly estimate, perhaps, without more definite knowledge of conditions, what amount to-day in Morgan County this one hundred and twenty dollars equaled, but at the best it was but a small sum to live on for three months and save enough from to make a start in such a life as Douglas was planning for himself; but he did it. Fees for legal services were not large in Illinois then, nor for many years thereafter, as such matters are now considered, and luxurious and costly living

was not known among the legal or judicial friends of Lincoln and Douglas.

A Judge of the Supreme Court of Illinois for many years, who, through judicious and fortunate investments in telegraph enterprises in their first development, died a multi-millionaire, was forced at this time to live on the pitiful salary of twelve hundred and fifty dollars a year, and as U. F. Linder in his amusing *Reminiscences of the Early Bench and Bar of Illinois* relates, objurgated a dog that ran off with a ham newly purchased, as the meanest of curs. "A dog," he exclaimed, "that would rob a Supreme Court Judge would steal the last piece of meat from a negro cabin!"

Douglas is said to have ridden from Springfield to Bloomington on horseback and tried a case for five dollars. This was probably exceptional, but Lincoln was known at a much later date to have been very well satisfied to return from the Circuit with a very few hundred dollars. It was not many years before Lincoln's election to the Presidency that the President of the Illinois Central Road, then living in Detroit, compelled him to sue for a bill of \$5,000 for services in the preparation and argument of a cause in the Supreme Court of Illinois which settled the immunity of that railroad from general taxation—an immensely important matter for the railroad. "A country lawyer should not give himself such airs," was the comment of this officer of the road on Lincoln's bill when it was presented through its

legal department. The precise remark was characteristically repeated by Mr. Lincoln when the Detroit lawyer, no longer President of the railroad, however, three or four years later was pressed by his friends for a place on the Supreme Bench of the United States. Fifty thousand dollars might not be considered to-day too large a charge for a lawyer of Mr. Lincoln's eminence in 1856 to make for a successful litigation like that in *The Illinois Central Railroad vs. The County of McLean*; but at the time in 1834 which we are considering, the wildest hopes of future professional rewards which either Lincoln or his friend Douglas entertained probably fell very far short of five thousand dollars for a single case.

Douglas had already in Canandaigua studied law; he borrowed some books from a local lawyer at Jacksonville or Winchester, and gave all the time that his teaching left him during the winter of 1833-1834 to preparation for admission to the Illinois bar. At that time, to judge from anecdotes which have come down to us as traditions, examinations were not very severe as a rule nor altogether free from imputations of partiality and favor. The application for "a license to practice" was referred by the court to a committee which the applicant was very likely to have the principal influence in naming. To a popular youth such as Douglas had become, especially to one so full of promise for the future, the ordeal was not a hard one, and immediately on his return to Jacksonville in March, 1834, he received his license,

opened an office and fairly launched himself upon the career destined to be so brilliant. To be a lawyer at that time in Illinois meant to be also a politician, and for that part of his business at least, Douglas, by his manners, by the natural bent of his mind, and by the attention which as a boy he had paid to public questions, was well equipped.

We hear of him at once, although not yet of age, assuming with the aid of the local editor the leadership of the party of the National administration in Jacksonville, and of his flooring in debate at a political meeting a veteran lawyer of ability, afterward attorney-general of Illinois. So triumphant were the Jackson men over his victory that they chaired the youthful orator and bore him on their shoulders around the village square.

In February, 1835, less than a year after opening his law office, he was elected by the Legislature of Illinois the State's Attorney of his Circuit, the first in name and the first in importance in the state. He held the office for two years, and despite the want of experience and books which had been urged against his candidacy, fairly won his spurs among the rising and able men against whom he was pitted.

In 1836 he was elected to the Legislature of Illinois, where he took his seat in December of that year. Abraham Lincoln, four years older, was a Whig representative from Springfield. He pronounced Douglas "the least man he had ever seen." There began the acquaintance and the rivalry which ter-

minated at Washington in 1861, when on the dark day that Fort Sumter was attacked Douglas bade the President be of good cheer, and went back to Chicago there to declare to the Democrats of the country, "In this war there can be no neutrals—only patriots and traitors," and with these last words of inestimable value to the Nation, to bid good-bye to his restless ambitions and energies, in the mortal illness which so soon carried him beyond their sphere.

Filled with the ablest men of Illinois as the Legislature was in 1837, Douglas became, nevertheless, in spite of his youth, a leader immediately, and applied himself with both zeal and wisdom to the work of legislation and of party management. He carried through a measure which relegated to the courts entirely the granting of divorces, which the Legislature had been decreeing. He opposed the madness of the hour, which led the Legislature to appropriate millions from a scanty treasury, and many millions more in credit from a discounted future, to speculative and fantastic schemes of river, canal and railroad improvements. He resigned his seat shortly to accept from the National administration, of which he was an ardent defender, the office of Register of Public Lands at Springfield—a lucrative appointment, as it was then considered. The office was not, however, suited particularly to his talents or his tastes, and he gladly threw it up to accept what seemed the leadership of a forlorn hope, in November, 1837, almost six months before he had arrived at the con-

stitutional age for Congressman, in a nomination for the National House of Representatives from a district which included a large part of the State of Illinois. The election was not to take place, however, until August, 1838. By that time he would have passed his twenty-fifth birthday. John T. Stuart, a law partner of Mr. Lincoln, was his opponent. For five months they canvassed the district, frequently traveling together. A successor of Mr. Douglas in the United States Senate—John M. Palmer—then a youth of less than twenty-one, and an ardent adherent of Douglas, in his memoirs has given amusing anecdotes of the primitive accommodations and the pioneer hardships which the contestants had to endure in this canvass. Out of thirty-six thousand votes and more which were cast, twenty votes, it is said, were rejected by Whig returning officers because Douglas' name was incorrectly spelled (perhaps the final s was doubled, as in every instance it is where he is mentioned in the Illinois Supreme Court Reports), and in consequence Stuart was through this unworthy quibble, declared elected by a majority of five. Had Douglas not thus been defeated, he would never, we may suppose, have been Judge of the Supreme Court of Illinois, and although a member of the bar, his title to any place *eo nomine* among the distinguished lawyers of America must have been considered more than doubtful. But with what sincerity can only be matter of speculation, the young political leader now announced that he should



devote himself thereafter to the practice of his profession, and up to January, 1841, the preparation and trial of causes was his chief concern. He did not return to Jacksonville, but established permanently his office at Springfield. He, however, found time for political campaigning throughout the state for Van Buren in the Presidential contest of 1840, and largely through his zeal and ardor, Illinois was saved for the Democracy, although the "singing campaign" carried every other northern state but New Hampshire, for "Tippecanoe and Tyler too."

Nevertheless, during these two years and a half Mr. Douglas made a name for himself in Illinois as a lawyer. I have spoken before of the companionship he had "on the Circuit." From county seat to county seat the ambitious young men rode together, discussing questions of law as well as of politics, learning from each other faster than books alone could have taught them, the rules and principles of jurisprudence. We can hardly realize in these days of great libraries and ever-multiplying reports, textbooks, digests and encyclopedias of the law, under what different conditions the distinguished lawyers of the west in the earlier half of the last century gained the knowledge of their profession. "He is no lawyer and he has no law books," was the remark tradition ascribes to a judge of the Supreme Court concerning Douglas when he was elected State's Attorney in the first Circuit. In that office, however, and in the private practice which he was now build-

ing up, Douglas showed no lack of that knowledge of legal doctrines which was necessary to supplement his natural ability and his unusual facility in getting at the essential elements of a controversy. Throughout his life of statecraft, as well as in his study and practice in matters of the law, Mr. Douglas was not apparently a close student of books. He was a rapid but not a constant nor absorbed reader. He preferred to get his facts digested and his ideas clarified in dialogue and conversation, in which he was always at his best. In after years in Chicago and at Washington, shortly before making some important political address, it was Mr. Douglas' habit to gather some of his intimate friends and advisers around him in conversation, to set them talking on the subject in hand, and by apt question or criticism call out material which he needed, and which thus in his possession, he used in his coming speech with great facility and force. In these conferences of his later life, he preferred as his interlocutors men younger than himself, men, clever and ambitious, with their spurs yet to win, and attached to him by political principles and personal friendship. Not infrequently was to be found among them the present Chief-Justice of the United States. Tradition has it, that in his younger days Douglas pursued the same course with his contemporaries at the bar.

The judicial system of Illinois at this time was that created by the first Constitution of the state adopted in 1818. It consisted partly of a Supreme

Court with a chief-justice and three associates, all of whom, contrary to a custom very common in other parts of the country, were, in Illinois, invariably lawyers.

It cannot be said that they were all only lawyers, for the practice of transferring them from the bench to political office became so common that a special provision was inserted in the subsequent Illinois Constitution of 1848, making judges of the Supreme Court ineligible for any other office during the term for which they were elected and one year thereafter, and making any popular or legislative vote for them for such an office, void.

Besides the Supreme Court, there were, when Douglas came to the bar and began to practice, nine Circuit judges, each elected by the Legislature for a specific Circuit in the state. There was, of course, also a Federal court, sitting from time to time in Springfield. The judges of the state courts were, when once elected, to hold office during good behavior, except that they were subject to removal by the Governor for any reasonable cause not sufficient ground for impeachment, on the address of two-thirds of each branch of the Legislature.

If the pecuniary interests coming under the review in the courts of Illinois were not then as extended and important as they are in these days, there was no lack of importance in principle in the legal questions which presented themselves. It is to be remembered that the Supreme Court, for example, in the reports

of which alone we can follow the work of the Illinois bar of that day, was more concerned then in making than in following precedents. Books, as has been noted were comparatively few, and rigorous logic and close reasoning in the court room and conference room had to take their place.

In the second volume of reports of Illinois decisions (1 Scammon's Reports), in which appear the opinions of the Supreme Court rendered from 1835 to 1839, Mr. Douglas' name appears as counsel for one or the other of the parties in six cases, of varying importance, and in each of them he was victorious. Some were commercial cases, and one a *quo warranto* proceeding to try title to a state office.

The second volume of Scammon's Reports contains the cases decided between the December term, 1839, and the December term, 1840, and in this volume there are recorded eight cases argued by Mr. Douglas, some of which he won and some of which he lost. Two were of especial importance, and the zeal and feeling which Douglas threw into their trial aided his future advancement to the bench and subsequently to his high political honors.

Thomas Carlin, an ardent Democrat, had been elected Governor of Illinois in 1838. In 1839 he appointed John A. McClernand, known thereafter during a long life in Illinois, as one of its most eminent citizens and soldiers, Secretary of State. But the place was then filled by one Field, a Whig and an appointee of the former Governor. The Consti-

tution of the state provided that the Governor should nominate, and by and with the advice of the Senate appoint, a Secretary of State, but was silent concerning the power of removal. Field refused to yield the office, McClernand brought *quo warranto*, and in the Circuit Court the decision was in his favor. Field appealed, and in a very elaborate opinion, able and exhaustive, but which, in the view subsequently almost universally taken in the matter of appointed officers in this country whose tenure is not protected by definite enactment, reads somewhat strangely now, the Supreme Court in two concurring opinions of the two Whig judges, held that the power of removal was not coincident with nor implied by the power of appointment, and that the Legislature alone, if any power whatever, had the authority to remove a Secretary of State. The opinion of the majority of the court laid down certain general propositions, which have received complete acceptance as the received doctrine of Illinois—for example, that the Constitution of Illinois is a limitation upon the powers of the legislative department of the Government, but is a grant of power to the other departments, that the executive and judiciary, therefore, can exercise no power not expressly or by implication granted to them therein, that legislative construction, although to be considered, is not binding upon the courts, and that when the Supreme Court of Illinois has declared the law on a given point, all other courts in the state are bound to conform to its decision.

But the doctrine that the executive power of removal should be coextensive with the power of appointment, was recognized in the present Constitution of Illinois as construed by the Supreme Court of Illinois in 1878, and the dissenting opinion in the Field case, of Judge Smith, the Democratic member of the bench, following the lines of the argument of Mr. Douglas for the appellee, will perhaps, in the light of the later legal thought, be deemed to contain the better law. All the opinions as they are found in the second volume of Scammon's Reports<sup>1</sup> are worth the attention of the lawyer and the historical student of to-day, if for no other reason than that he may see how thorough and how intense were the investigation and consideration that this frontier court, which some wise men of the East affected then to despise, could give to fundamental questions of constitutional law and governmental policy.

Whatever subsequent opinion may be as to the relative merits of the majority and minority expressions of the court in the Field case, there is no doubt about the contemporary opinion. Every Whig in the state approved the majority opinion, and every Democrat the minority opinion, and as the election of the next year (1840) proved the Democrats to be in the numerical majority in the state, and the party was in control of the Legislature, a reorganization of the court began at once to be threatened.

But the actual accomplishment of this judicial

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<sup>1</sup> Field vs. People, 2 Scammon's Reports, 79.

revolution, for so it proved to be, was the result of a still more fiercely contested political lawsuit in which also Douglas bore the brunt of the battle for the Democratic interests involved.

At the June term of the Supreme Court of Illinois in 1840, an appeal in a cause coming up from the county of Jo Daviess was submitted, in which one Houghton had sued one Spraggins in a *qui tam* action for a penalty of one hundred dollars, for receiving as a judge of election at Galena in August, 1839, the vote of an alien named Kyle, who was a native of Ireland and had never been naturalized according to the laws of the United States, but had resided in Illinois and in the county of Jo Daviess for more than six months preceding that election. The Circuit Court in Jo Daviess County had given judgment for the plaintiff, thus of course holding that the vote was illegal. Mr. Douglas, with another prominent Democratic lawyer of Springfield, appeared in the Supreme Court for the appellant, and Mr. Justin Butterfield and another able Whig lawyer for the appellee. The court suspected, or pretended to suspect, the action to be a feigned one, and after hearing the argument, continued the cause with leave to the parties to prove the contrary at the opening of the next term, as an alternative to having the judgment vacated and the cause dismissed. This reluctance to decide the merits of the main contention was attributed to improper motives and much feeling was aroused. The argument had been exceed-

ingly able. Mr. Douglas had taken the broad ground that the naturalization laws had no reference to the elective franchise—neither conferring or restraining it, and that a state might confer any right of suffrage it chose upon alien residents. He fortified his argument by pointing out that the ordinance of 1787 concerning the Northwest Territory made residence and not citizenship the basis of right to representation; that Congress had recognized this in the laws authorizing the constitutional conventions of Ohio, Indiana and Illinois, in which conventions to form the original state constitutions, aliens had seats and votes, and had also recognized it in admitting Michigan as a state with a constitution allowing aliens to vote. He called attention to the laws of some other states allowing unnaturalized citizens and free negroes to vote, and emphasized the contemporaneous construction of the Illinois constitution in admitting alien votes by the practice of its framers through twenty years. Mr. Butterfield in reply insisted that if the constitution of any state purported to confer a right upon aliens to vote, it was repugnant to the Constitution of the United States and void, and that the Constitution of Illinois was subordinate to the Constitution of the United States if in conflict therewith; that the government in the United States was a political corporation, of which an alien could not become a member save by some express agreement to receive him; that the rights given to aliens in the Northwest Territory had no bearing



upon the rights and duties of Illinois after she was admitted to the Union on an equal footing with the original states. He contended that the admission of Michigan was but a special act of naturalization of its existing alien inhabitants. Finally he appealed to the fear which was beginning to find expression, particularly among the Whigs, of the domination of the country by the foreign born—as it was put by one of Henry Clay's correspondents after his defeat in 1844—that the Irish were recovering the country which the English had lost!

Mr. Douglas held in this controversy a position consistent with that doctrine of decentralization which he always upheld as a political principle, and here first came forward as the distinct opponent of the nativist agitation, which in the guise of a "Know-Nothing" or an "American" party, he afterwards vigorously fought.

The alien vote to be affected by the decision was supposed to be about ten thousand, and political excitement was high. Mr. Douglas publicly charged, and Mr. McClernand in the Legislature reiterated the accusation, that the judges had withheld an opinion which they had prepared adverse to the aliens, in order to avoid unfavorable action on a bill pending in the Legislature affecting their duties and salaries. The judges united in a letter to the Whig leader in the Legislature, denying this imputation.

The decision was handed down at the December

term, 1840, and the main opinion in the case was written by Judge Smith, the Democratic member of the bench. Following the lines of Mr. Douglas' argument, he gave an unqualified adhesion to its conclusion that Kyle, although an unnaturalized alien, being an inhabitant and resident of the county and state, was legally qualified to vote, and that the judgment of the Circuit Court should be reversed. The other judges, who were Whigs, concurred in the decision of reversal, but not in the reasons therefor. They found on technical grounds, that the election officer had not violated the statute sued on, and was not liable to the penalty, even if Kyle was not entitled to vote, upon which point they all three declined to give any opinion. This was satisfactory enough to the Democrats for the immediate present, but they determined to safeguard their interests while they had the power by a reorganization of the court, and indeed of the entire judicial system of the state. By an act passed by the Legislature on February 10th, 1841, the Circuit judges were abolished, and the number of the Supreme Court judges increased to nine, each of whom was to preside also in one of the nine judicial circuits, and meet with his brethren in the Supreme Court in two terms during the year. Five days later the five new judges were elected, all of them Democrats. They were, Thomas Ford (the following year elected Governor), Sidney Breese, then Circuit judge, the following year elected to the Senate of the United States, from which he re-

turned at the end of six years to take his place again on the Circuit Bench, and then again in the Supreme Court of Illinois, of which he was thereafter for twenty years a distinguished member; Walter B. Scates, for many years thereafter a member of the court; Samuel H. Treat, afterward for many years a Federal judge and finally Stephen A. Douglas, whose advocacy of the cause which really led to the reorganization of the court, had brought about the change in the judicial system.

Thus had Douglas, when less than twenty-eight years old, and less than seven years from the time when a penniless adventurer from the east he had been admitted to the bar of Illinois, become a member of its ultimate tribunal, with colleagues than whom no court in Christendom could claim abler jurists. Douglas was obliged, in order to take the seat, to relinquish another office to which he had been appointed. The Legislature, which in the Field case had been declared to be the only power which could remove a Secretary of State once appointed by the Governor, had in January, 1841, removed the Whig incumbent of the office and appointed Douglas to succeed him. Douglas took the oath of office as Judge of the Supreme Court of Illinois on the last day of the first term in 1841, and remained a judge of the Supreme Court of Illinois only until June 28th, 1843, a scant two years. He then resigned to make the race for the lower house of Congress, against O. H. Browning, his Whig competitor. In

the meantime, however, his name had been presented to the Legislature as a candidate for Senator, an office for which his age fell short of the legal requirement. In his term of office, however, as Judge of the Supreme Court, he made for himself, in the purely legal annals of Illinois, a name not to be forgotten. He was assigned under the legislative apportionment of the districts of the state to hold the Circuit Court in the Fifth Circuit, which was the westernmost circuit of the state, and included the city of Quincy on the Illinois River, where, during his term of office, he made his home. As Circuit judge he distinguished himself by his stalwart and praiseworthy opposition to the public clamor which called for the life of the Mormon leader, Joseph Smith, without trial or investigation, on the charge of murder.

In the Supreme Court Judge Douglas' opinions showed a judicial and legal mind of the highest power. There were brought before the court while he was a member, questions of practice, questions of criminal law, where the popular cry was against those principles of the common law which have stood the test of ages as the strongest bulwarks of popular liberty, and questions of commercial law, in which the popular side was opposed to the enforcement of contracts voluntarily entered into; and in no one of these did he flinch from declaring that which the consentient voice of the more judicious has always declared to be in ac-

cordance with the rules of justice and right reason. Pure technicalities he pushed aside,—interferences with freedom of contract he held illegal, even unconstitutional—if need was; and the principles of the common law which threw around the citizen accused of crime the presumption of innocence, he upheld with uncompromising firmness.

In the light of subsequent events and the discussions which raged thereafter so furiously about Douglas' position in regard to slavery, it may be noted that he was a member of a court in Illinois with a majority of his own political faith as colleagues, which declared in 1841, in a case in which Shields and Trumbull were the opposing counsel,<sup>2</sup> that the presumption in Illinois was in favor of the freedom of every man, black or white, and that the contrary rule held in slaveholding states was founded on injustice and subversive of natural right. Yet Judge Douglas on the circuit—as he afterwards asserted with apparent pride in the Senate of the United States—when sitting as a Circuit Judge under the law of Illinois, imposed under that law severe penalties on citizens who had harbored and assisted fugitive slaves.

The early legislation of Illinois, as was natural, had been largely copied from the enactments of various older states, which were thought applicable. Judge Douglas, in the case of *Campbell vs. Quinlin*, laid down the proposition of great importance in

<sup>2</sup> *Kinney vs. Cook*, 3 *Scammon's Reports*, 232.

the construction of the laws of Illinois, that with the statute of another state the Legislature is presumed to have adopted the construction given to it by the courts of that state.<sup>3</sup>

In another case <sup>4</sup> Judge Douglas also delivered an opinion of much greater importance even, in establishing fundamental bases for the law of Illinois. He declared that not only the common law and statutes in amendment thereof as they existed in England prior to the fourth year of James I (which the Legislature had expressly reënacted) were in force in Illinois, but the common law in a broader sense. The fourth year of James I, he says, was named as the date at which the common law was transplanted into this country by the establishment of the first territorial government. By the ordinance of 1787, however, erecting a territorial government for the Northwest—a compact between the people therein dwelling and the original states—it was provided that the inhabitants of the territory should always be entitled to the benefit of judicial proceedings according to the common law. By this the parties to the compact meant not necessarily the common law as it existed in England before the settlement of America, but the common law as it then existed in the territory, modified and improved and adapted to the condition, circumstances and habits of the people by a long course of American legislation and

<sup>3</sup> 3 Scammon's Reports, 288.

<sup>4</sup> Penny vs. Little, 3 Scammon's Reports, 301.

practice, and as it was then understood and expounded by the courts of America. He said:

The common law is a beautiful system, containing the wisdom and experience of ages. Like the people it ruled and protected, it was simple and crude in its infancy, and became enlarged, improved and polished as the nation advanced in civilization, virtue and intelligence. Adapting itself to the condition and circumstances of the people and relying upon them for its administration, it necessarily improved as the condition of the people was elevated. . . . But if we are to be restricted to the common law as it was enacted at fourth James, rejecting all modifications and improvements which have since been made by practice and statutes, we will find that system entirely inapplicable to our present condition, for the simple reason that it is more than two hundred years behind the age. . . . The inhabitants of this country always claimed the common law as their birthright, and at an early period established it as the basis of their jurisprudence. Slight changes and modifications were found necessary, and consequently adopted by common consent from time to time to adapt it to our peculiar institutions and the habits and customs of the people. These changes, modifications and customs having for a long course of years been acquiesced in by the people and sanctioned by the courts, have acquired the force of law and become incorporated into and made part of the common law of the land. The legislation of the territory and of our state was adopted with reference to the law as it then existed in the country.

It can be seen from this opinion how little Douglas shared the fear of some of his Democratic brethren—a fear which still survives—of “judge-made law.” It is also to be noted that he treats this very important question wholly from the standpoint of logic and right reason, apparently disdaining a

search for precedents where general principles seem plain and adequate for a rule of decision.

That Judge Douglas highly esteemed the judicial office and its dignity, is shown by his dissent, notwithstanding his Democratic views, from the decision of the majority of the Court in *Stuart vs. the People*.<sup>5</sup> A newspaper editor in Chicago had been adjudged guilty of contempt and fined in the Circuit Court for matter printed in his paper, ridiculing the judge. The Supreme Court, Judge Breese delivering the opinion, reversed the judgment, declaring that "An honest, independent and intelligent court will win its way to public confidence in spite of newspaper paragraphs," that "Respect to courts cannot be compelled, but is the voluntary tribute of the public to worth, virtue and intelligence," that if a judge be libeled by the public press, "He and his assailant should be placed on equal grounds and their common arbiter should be a jury of the country;" that "Power to punish for contempt is at best an arbitrary power, not a jewel of the court to be prized, but a rod most potent when rarely used."

Not even these Democratic and, as some of us still think, salutary doctrines, could prevent Douglas from registering his opinion that the sentence should stand.

But Judge Douglas's opinions upon these broader questions were not the only ones in which he laid down rules never since departed from in Illinois.

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<sup>5</sup> 3 Scammon's Reports, 395.



In *Camden vs. McKoy*<sup>6</sup> he laid down in an opinion cited scores of times since by his successors in the court, rules concerning the differing liabilities of parties to negotiable paper in Illinois, which have ever since determined the law on the points involved. In this case, which was on precedent doubtful, he cited New York and Massachusetts cases freely, but showed the tendency of his mind in judicial questions by finally declaring that the authorities were not definite and conclusive, but that aside from authority and on general principles, the question was free from difficulty.

In *Heaton vs. Hulbert*<sup>7</sup> Judge Douglas laid down the rule concerning negotiable paper, that the payee of a note signing a guaranty upon its back and negotiating it gives the transferee the immunities of an indorsee, although himself not an indorser but a guarantor—a doctrine which is undoubtedly the more approved one among a contrariety of decisions—the Supreme Court of the United States differing from Illinois and the majority of states therein.

In criminal cases Douglas always stood, as we have indicated, for a conservative adherence to the old standards, and among other decisions he called a halt on a growing tendency to call an error in judgment or a departure from sound policy on the part of public officers “a palpable omission of duty” in the sense of the criminal code. A recurrence to the principle

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<sup>6</sup> 3 Scammon's Reports, 437.

<sup>7</sup> 3 Scammon's Reports, 489.

here involved has been needed more than once in Illinois since.

June 28th, 1843, Judge Douglas resigned his seat on the bench and entered into another vigorous contest for a seat in Congress. He was elected over his Whig competitor, O. H. Browning, by a decisive majority. A biographer says of him:

On his way to Washington he visited Cleveland, where his westward journey had come so near an abortive ending, and then his home folk in Canandaigua. He was but thirty years old, yet he had held five important political offices; he had risen to high rank in his profession, he was the leader of the dominant party in a great state, and all this he had done alone, unaided. Few aged men ever have brought back such laurels from their western fortune seeking. In December, 1843, he took his seat in the House of Representatives and began to display before the whole country the same brilliant spectacle of daring, energy and success which had captivated the people of Illinois.

If we have lingered long over the third decade of Douglas' short life, although his influence and power were multiplied many fold in the eighteen years that followed, it is because with 1843, as we have before noted, his career as a lawyer and a jurist finally ended. Unlike some of his contemporaries, he did not mingle professional with political duties, but gave himself with unrestrained ardor and industry to the public affairs for which he had so great a bent and such great talents. This sketch is designed expressly to describe Mr. Douglas as a lawyer and a judge, and it would not be fitting to follow him through his career in statecraft with elaboration and

detail. His history from his entrance into the House of Representatives in December, 1843, and more especially from his taking his seat in the United States Senate in 1847, to his death in June, 1861, at Chicago, where, after his election to the Senate he made his home, is so intimately bound up with the history of the time, and has been so often told from the varying points of view of enthusiastic admiration, friendly criticism and pronounced hostility, that in this article it hardly demands recapitulation.

But however good reason, apart from his political career, Illinois lawyers have to remember the aspiring Vermont youth, who was a leader of its bar and then a member of its highest judicial tribunal at an age when most men are hardly admitted to practice, it is true that had Judge Douglas' life ended in 1843, when he left the bench, his legal and judicial career would have been of small concern except to local or professional antiquarians. As it is, the great part that he afterward played in the political history and development of the country throws back upon his short career as a practicing lawyer and a judge, a reflected interest for all students of political and constitutional questions. Concisely, therefore, we will follow him in his political life.

Mr. Adams sneered at his first speeches in Congress, and expressed astonishment that this man "with the air and aspect of a half-naked pugilist," should have come "from a judicial bench." Doubtless the judicial as well as the forensic manners in

the early days of Illinois lacked the polish and conventional dignity of those to be found in Westminster Hall. But there were questions before these frontier courts as important in public and private interest as any that demanded the attention of the be-wigged and begowned barristers and judges of England herself, and the judgments of these courts were as promptly and inexorably executed as though they had been delivered with imposing forms and solemn ceremonies. If the homely jeans and the coonskin caps of some of the western jurists would have excited "inextinguishable laughter" in older civilizations as unfit habiliments for reverend judges, so we may be sure would the horsehair wig and the silk gown of the Lord Chief-Justice have seemed ridiculously absurd in the Valley of the Mississippi in 1840.

Mr. Douglas adapted himself as quickly to the manners of Washington society as he did throughout his life to all other environments in which he was placed. If Mr. Adams, the ex-President, doubted his ability to become a power in Congress, he probably changed his mind and judged better of his training for debate when in a memorable speech in the House, which was in favor of repaying to General Jackson a fine which had been imposed upon him for contempt of court during the defense of New Orleans, Douglas gave the questioner who asked what precedent he could urge for his proposition, the bland reply that he "presumed that no

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case could be found on record where a fine imposed upon a general for saving his country at the peril of his life and reputation had ever been refunded."

At all events Mr. Adams could not have underrated his antagonist's strength in debate when in the discussion of the annexation of Texas, Douglas turned upon him with a quotation from one of his own letters as Secretary of State a quarter of a century before, that "the claim of the United States to the boundary of the Rio del Norte was as clear as their right to the island of New Orleans."

Besides his advocacy of what he called the reannexation of Texas, his prominent participation in the Oregon controversy with Great Britain, in which he took extreme ground, declaring for no further negotiation or compromise, and his ardent defense of the war with Mexico, Mr. Douglas' service in the House, to which he was reelected by greatly increased majorities in 1844 and 1846, and in which in his second term he was made Chairman of the very important Committee on Territories, was marked by untiring efforts in behalf of the local interests of his constituents and his state in the matter of internal improvements. He favored the bills for the improvement of inland rivers and harbors, he advocated the grant of public lands in aid of a railroad through Illinois, not, however, to the railroad directly, but to the state, and he secured the passage of legislation by which the admiralty jurisdiction of the Federal Courts was extended over the northern

lakes. Mr. Douglas did not take his seat in the House after his reelection thereto in 1846. Before it met the Legislature of Illinois elected him Senator, and he took his seat therein at the age of thirty-three, among associates such as Webster, Cass, Clay, Benton and Calhoun. How well he maintained there the position among the champions and leaders of the party of his choice until he had become in the changes of the next fifteen years its acknowledged head among the masses at the North who clung to it, is trite political history.

He was immediately made Chairman of the Senate Committee on Territories, and in that position was at the storm center of the increasing bitterness of sections and parties on the slavery question, until his break with the Buchanan administration and the solid South about forcing the Lecompton Constitution upon the people of Kansas led to his deposition in the winter of 1858-9. But by that time no senatorial influence or position was necessary or even helpful to Douglas to insure attention to whatever he might say to his countrymen. He was the political idol of a million people, the hated and feared *bête noire* of another million, and an absorbing problem to still another. No utterance of his on the questions of the hour then failed to secure the ear of all who thought on political affairs, and who, in the America of that time did not?

Mr. Douglas had come to this commanding position in the public eye through unremitting energy

in public affairs. He had taken the chief part in the making of states and led in the organization of many territories. He had practically made possible the Illinois Central Railroad and thus given a magnificent impulse to the development of the state of his adoption, which had so early honored him and which treated him as her best beloved son. He had vigorously upheld government coöperation in the building of the Pacific Railroad, he had proposed a reorganization of the Federal judiciary by a plan which should relieve the Supreme Court judges and yet keep them in touch with the people and with the procedure and laws of the different parts of the country. It was not adopted, but it was the model on which the Circuit Court of Appeals Act in 1891 was framed.

He gave much of his constant industry and restless energy to the welfare and protection of western emigrants, remembering doubtless his own adventures for fortune. He framed measures for the extinguishment of Indian titles and for the prevention of Indian depredations.

In the matter of our foreign relations he allied himself to the most robust Americanism of the time. He cared not for sarcasm or imputations of demagoguery used against him because of his somewhat flamboyant patriotism. In every question for discussion that arose with a foreign government, he seems to have had great faith, first, that no foreign state would dare to accept a challenge of war if this

country showed a sufficiently bold front; and, secondly, that if war came there could be no doubt of victory. He was an ardent defender of that cry of "fifty-four forty or fight," which in the Oregon dispute brought us to the brink of war with Great Britain. He supported with enthusiasm in 1846 the presidential theory that war with Mexico existed by the act of Mexico, and after the war was over opposed the treaty of peace as yielding too much. He many times, with the "gay disregard" of foreign opinion which Rufus Choate admired, declared that he desired no alliance with Great Britain, but would rejoice in driving her from North America. He declared that it was immaterial what Europe might say concerning the welcome to Kossuth, that the bearing of the country should demonstrate its sympathies with a popular movement against despotism. He declared that the armed intervention of Russia to deprive Hungary of constitutional rights authorized the United States to interfere and prevent the consummation of the deed. He vigorously opposed the Clayton-Bulwer treaty because it pledged the United States never to occupy Central America. He predicted that the time would come when this would be necessary, and feared that the faith of the Republic would then be violated. He expressed himself heartily in favor of the acquisition of Cuba whenever it could be obtained consistently with the honor of the United States. "Our young Nation," said Mr. Douglas, speaking to the Senate in 1853,



"with all her freshness, vigor and youth, desires no limits fixed to her greatness, no boundaries to her future growth. She desires to be left free to exercise her own powers, exert her own energies, according to her own sense of duty, in all coming time." He repudiated the opinion of some of his fellow Democrats that all territory belonging to the United States must be considered as having the possibility of statehood, and was to be governed by Congress under the limitations of the Constitution, declared his belief that conquered or acquired territory could be governed by us as every other nation governs its dependencies, and that therein either imposed or autonomous governments could be set up by Congress, exercising the powers that Congress itself could not constitutionally exercise. "Expansion is the law of our existence; when we cease to grow we commence to decline," he said.

But with all his enthusiastic Americanism he never for a moment dallied with the spurious imitation of it which under various forms of intolerance organized anti-foreign factions and parties of ephemeral popularity and power. He was always the friend of immigration and immigrants, and the foe of proscription and nativist intolerance.

Great, however, as was the popularity and political strength which the persistent and potent advocacy of the ideas which we have indicated, and which have since had marvelous growth in this country, gave to the "Little Giant of Illinois," as the whole

country had learned by this time to call him, it was not that advocacy alone nor chiefly, which had made his a name to conjure by among the multitudinous mass of his party associates, and had made him an object of almost idolatrous attachment among thousands of the leading spirits of that mass, and therefore in three successive national Democratic conventions, in 1852, in 1856 and 1860, a leading candidate for the Presidential nomination, a prize eagerly desired, but grasped finally in 1860, only to turn to Dead Sea fruit in the taking.

It was the same element in his political ideas and action that almost made him in comparative youth the Presidential candidate of the dominant party, that kept him at the front continuously through his public life as the natural and inevitable leader of the larger proportion of that party, and finally gave him the nomination when that party was hopelessly divided and doomed to defeat. The irrepressible conflict on slavery, arraying section against section, had divided the Democratic party as it divided the Whig party, and as it divided societies, churches and families. It was the position which Mr. Douglas took upon slavery in the United States from the time of his entrance into public life at Washington until his death, which was of chief interest to the country, and it was this which raised up for him crowds of devoted and admiring friends and swarms of determined and bitter foes. It has been rather the fashion of the critics of Douglas in later days,

whether professedly impartial or professedly hostile, to follow the partisan cry of his opponents in his own time, and to attribute much of his action in the varying crises and emergencies of the slavery conflict to a personal ambition for the Presidency swaying his speech and deed without regard to convictions or consistency. It seems to the writer that nothing could be more untrue or unjust. Mr. Douglas early in life declared himself as indifferent to any alleged moral quality in chattel slavery for the negro. He did not believe that it had such a quality. Between the attitude of Mr. Calhoun and many another Southerner, that negro slavery was "an unmixed blessing" to both races, and the position of Mr. Garrison and many another Northerner, that it was "the sum of all iniquities," there was certainly a great gulf fixed. To-day, with the evolution of our political society written into the record of history, the younger generation finds it hard to realize how men could sincerely hold that a Union, half slave and half free, where such divergent opinions on a fundamental basis of social organization and domestic law were held, could be anything but "a house divided against itself," and that it could be expected to endure. More remarkable still does it seem to this younger generation that great masses of high-minded, conscientious and intelligent men could believe that there was no moral character to slavery, and that it mattered not "whether it were voted up or voted down" in the rapidly settling territories

which might contain hereafter the majority of the population of the United States. But one may remember Carlyle's "*Ilias Americana in Nuce*," in which little apologue anent our Civil War the great English historian bred in a free society though he was and removed from temptations to race prejudice, noted his belief that it mattered not at all whether labor was hired by the year or for life, and may thus more easily understand the fact that years before this the majority of people in most of the northern states, even in New England itself, were of the belief that if only the voice of the pestilent agitator, North and South, could be stilled, the slavery question need trouble no one. Mr. Douglas coming to central Illinois in the early thirties, found, as he himself said in the Senate, almost a thousand slaves there. Whether or not they were legally held, the ordinance of 1787 being considered, he did not care to discuss. But he said, "There were no scruples about it. Almost every man's father and mother had held slaves. But they said, 'Experience proves that it is not going to be profitable in this climate,' and as a matter of political policy, state policy, they prohibited slavery." "I have said, and I repeat," he declared also in the Senate, "that this question of slavery is one of climate, of political economy, of self-interest—not a question of legislation. Wherever the climate, the soil, the health of the country are such that it cannot be cultivated by white labor, you will find African labor and compulsory labor at

that. Wherever white labor can be employed cheapest and most profitably, there African labor will retire and white labor will take its place." Again he said:

I have no desire to conceal my opinions. I do not believe the negro race is any part of the governing element in this country except as an element of representation in the manner expressly provided in the Constitution. This is a white man's government, made by white men for the benefit of white men, to be administered by white men and nobody else, and I should regret the day that we ever allowed the negroes to have a hand in its administration. Not that the negro is not entitled to any privileges at all; on the contrary I hold that humanity requires us to allow the unfortunate negro to enjoy all the rights and privileges that he may safely exercise consistent with the good of society. We may with safety give them some privileges in Illinois that would not be safe in Mississippi, because we have but few, while that state has many. We will take care of our negroes if Mississippi will take care of hers. Each has a right to decide for itself what shall be the relation of the negro to the white man within its own limits, and no other state has a right to interfere with its determination. On that principle there is no irrepressible conflict, there is no conflict at all.

Quoting from one of Mr. Lincoln's speeches in Illinois in 1858, the statement of Lincoln's opinion that the slavery agitation would not cease until a crisis had been reached and passed, Mr. Douglas declared the doctrine to be revolutionary and inconsistent with the perpetuity of the republic, and in returning thanks to voters in Chicago after his return to the Senate in 1858 had been assured by the legislative elections he declared:

We must discard forever the fatal heresy which teaches that this Union divided into free and slave states as our fathers made it, can not endure — that false philosophy which says that these states must all become free or all become slave,—and the great principle of popular sovereignty must prevail, declaring the right of the people of each state and each territory to manage their own affairs in their own way. When that principle shall be recognized and proclaimed by the whole American people North and South, there will then be peace and harmony and fraternity among all the states of this Confederacy, but so long as that monstrous political heresy shall prevail, that the North must combine against the South to abolish slavery everywhere, and that the South must combine against the North to establish it everywhere, then there must be an irrepressible conflict between the North and South for the ascendancy, and so long will there be discord, strife and hatred between the different sections of the Union. Let us act upon that good old golden principle which teaches all men to mind their own business and let their neighbors alone. Let this be done, and this Union can endure forever as our fathers made it, composed of free and slave states, just as the people of each state may determine for themselves.

Over and over again on the stump, in the Senate, and in letter and pamphlet, Douglas protested against the doctrine of “a higher law” concerning slavery than the Constitution of the United States and the statutes thereunder enacted. Debating with Seward in the Senate, he exclaimed, “Your oath to support the Constitution binds you to every line, word and syllable of the instrument. You have no right to say that any given clause is in violation of the Divine law, and that therefore you will not observe it. The man who disobeys any one clause on the pretext that it violates the Divine law, violates his

oath of office;" and in the Illinois debate with Lincoln the declaration was repeated in almost every speech:—

I sustain the Constitution of my country as our fathers have made it. I will yield obedience to the laws, whether I like them or not, as I find them on the statute book. I will sustain the judicial tribunals and constituted authorities in all matters within their jurisdiction as defined by the Constitution.

There is much of all this that to the writer seems to lack truth and insight. There can be traced in it no prophetic and statesmanlike instinct which negated the possibility of two civilizations so different as the social organisms of the South and the North permanently living in amity under a common government, no sympathy with the natural rights of men as men to equal opportunities, no recognition of any moral quality in slavery. All these his great rival Lincoln had, and when the appointed time had come they made Lincoln the immortal emancipator of a race, while the memory of Douglas is fading with each succeeding year. There was a time after Douglas' death, too, when the ideas which have been noted as the source of his dealings with the slavery question seemed unpopular with the great mass of Americans, but there are words of his about the position of diverse races which must have a familiar sound to those who interest themselves in current political movements and events, and if one may judge from the utterances of many an accredited political philosopher of to-day concerning "natural rights," the question of

chattel slavery itself,—if it were not that the dread chances of war had decided it,—would not seem so hopelessly one-sided to some of the younger generation of Americans as it did to most of us in the score of years succeeding Douglas' death.

But this is beside our argument. Whether the creed of Douglas about slavery was right or wrong, wise or foolish, it was the doctrine not of Douglas alone, but literally of millions of his contemporaries, men and women who were sincerely patriotic citizens of the republic. It was not Douglas who made their creed for them; he simply expressed it forcibly and eloquently. They did not care to see slavery extended where people did not want it, but they had no objection to its spreading where the local community desired it. Above all else they wanted to see the Union preserved and the growth of the United States developed. The negro they believed was, on the whole, as happy with a master as he would be free. He was unfortunate in not being white, and there was an end. They wanted to see the slavery question "settled"—that was their constant cry. They would not have denied the trite maxim that great questions are finally settled only when they are settled right, but to them the method of settlement which Douglas so earnestly contended for—non-intervention by Congress with slavery anywhere save as the Constitution expressly required a fugitive slave law—and absolute freedom of choice by any homogenous territorial community before or



after statehood and wherever situated, seemed to them the right one and therefore likely to be lasting.

"Bear in mind," said Douglas at Bloomington in the debate with Lincoln, "the dividing line between State rights and Federal authority; let us maintain the great principles of popular sovereignty, of State rights, and of the Federal Union as the Constitution has made it, and this republic will endure forever."

We may deem this doctrine as applied to slavery foolish and superficial, if we will, but to hold that Douglas was insincere in proclaiming it, or to say that through personal ambition or any other motive he was disloyal to it or in his political action inconsistent with it, is to echo the cry of contemporary political rancor and to shut our eyes to a record entirely plain and open.

We have seen that Douglas as a judge of the Supreme Court of Illinois concurred in an opinion that in Illinois the presumption was in favor of the freedom of even a negro, but by his judgments enforced severe penalties for assisting fugitive slaves from other states. When he came to the lower House of Congress, the Missouri Compromise prohibiting slavery in the new states that might be erected from the Louisiana Purchase north of the line of 36' 30", and allowing it south of that line, was supposed to have been a final settlement of the fateful question. So Douglas held it, and was in favor of extending the line to the Pacific through territory acquired by an-

nexation or conquest. But it was evident soon after Douglas' entry into national political life that the question would not down at bidding, and that not even the refusal of petitions or communications to Congress touching the forbidden subject was effective in stilling even briefly the agitation in the South for the extension of slavery and that in the North for its restriction.

Mr. Douglas, at his first entrance into the Senate, evidently saw and appreciated the threatening danger, and at once announced his belief in the principle of Congressional non-intervention. He opposed the Wilmot proviso, to exclude slavery from all territory obtained from Mexico, and finally voted for the proposition in another form only under protest and because of the direct instructions of the Legislature of Illinois, whose right so to instruct him, he recognized.

In 1850 the dispute about slavery had reached its height in Congress. It had arisen on this very question of allowing slavery in newly-acquired Mexican territory. The compromise measures attributed to Mr. Clay were largely the work of Mr. Douglas. They included the admission of California with a constitution adopted by its citizens prohibiting slavery; the creation of a territorial government for Utah and New Mexico with authority to their Legislatures over all questions but the disposal of the public lands—Douglas having insisted upon striking out by amendment from the bills a restriction as to Afri-

can slavery;—the abolition of the slave trade in the District of Columbia, which Douglas held was proper because Maryland, of which the District had formed a part, had by legislation forbidden it in that state;—and finally a fugitive slave law, as provided for in the Constitution of the United States and demanded by the slaveholders to take the place of the law of 1793, which had proven ineffective. He defended these measures, particularly the last, so effectively in Chicago as to change a hostile into an applauding crowd and extort from the City Council resolutions rescinding previous adverse criticism.

Notwithstanding bitter resistance to the fugitive slave law, the requirement of some such law by the Constitution was universally admitted, and for a brief period there was a deceptive calm in the storm. The compromise measures were declared acceptable by the conventions of both political parties in 1852, and hailed by them as another final settlement of the slavery question. Then and at all times Douglas maintained that the principles of these acts virtually repealed the Missouri Compromise of 1820, by establishing a doctrine against congressional intervention, and in January, 1854, in the famous bill for the organization of the territories of Kansas and Nebraska, he inserted a provision for the express repeal of the Missouri Compromise, which declared that measure to be inoperative and void, as inconsistent with the principle of non-intervention by Congress with slavery in the states and ter-

ritories as recognized by the legislation of 1850, commonly called the Compromise Measures, "it being the true intent and meaning of this act not to legislate slavery into any territory or state and not to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."

Despite the instant revolt against this doctrine by many Democrats of the North who did not believe that the Missouri Compromise should be meddled with, and by others at the South who insisted that it denied the constitutional right claimed by them for protection to their slave property in all the territories of the United States, Mr. Douglas was able to carry the Senate with him in his contention by a large majority, and the House of Representatives by a smaller one. This was not because of his personal influence or eloquence; it was because this was another "settlement" of the slavery question on the non-intervention principle. Douglas said in his speech upon the bill:

Withdraw the slavery question from politics, adopt the principle of this bill as a rule of action in all territorial organizations, deprive agitators of their vocation, render it impossible for Senators to come here upon bargains upon the slavery question! I have not brought forward this bill as an act of justice to the South more than to the North. I know of no northern rights or southern rights under the Constitution. The bill does equal and exact justice to the whole Union and every part of it. Our opponents have dealt entirely in sectional appeal. The friends of

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the bill have discussed a great principle of universal application which can be sustained by the same reasons and the same arguments at every time and in every corner of the Union.

There is no good reason for doubting the sincerity of Douglas in these words, nor to impute them to any desire for Southern support. On the other hand, there is unimpeachable evidence in a letter of Senator Dixon of Kentucky to Senator Foote of Mississippi, that Mr. Douglas, before the passage of the bill, declared his belief that it would in the North bring upon him odium and opprobrium from many whose esteem he valued, and that it might end his political career. In fact, throughout the North and for the first time in his own state, he became unpopular. "I have been able to read the newspapers from New York to Chicago by the light of my blazing effigies," he extravagantly declared upon his homecoming in 1854.

Why anti-slavery men should have been so bitterly hostile to a measure, the principle of which after all made the Federal Union responsible for slavery less than did the principle of the Missouri Compromise, it is hard, in the light of subsequent events, to see. Sumner declared that the bill "set freedom and slavery face to face and bade them grapple"—a characterization of it which Douglas himself might not have repudiated. It would seem to us now that all men might easily have foreseen that in such a struggle the free states with their greater resources were sure to win. The shrewder

champions of slavery did foresee it, and their antagonism to Douglas was in consequence intense. But in season and out of season thereafter, for the few remaining years of his life, did Douglas, among friends and foes, at every apparent sacrifice and without the shadow of turning or wavering, contend for the principle of Federal non-intervention and of territorial or, as it was nicknamed, "Squatter" Sovereignty. It was declared by the Democratic Convention of 1856, the only sound and safe solution of the slavery question, and the new Republican party nominating for the first time a candidate for the Presidency, was forced into a position in advance of any preceding political organization of great importance. To make its issue for the ever-growing anti-slavery sentiment of the North, it declared for the prohibition of slavery in all territories of the United States. It attracted thereby hundreds of thousands of anti-Nebraska Democrats as they came to be called, most of them men who believed that great aid to the cause of slavery had been given by the repeal of the Missouri Compromise, although in the eyes of an unprejudiced historical observer of to-day it must appear that the existence of that recognition of the rightfulness of slavery in the public territory outside of the slave states was an obstacle and not an encouragement to the anti-slavery movement.

Douglas was a Presidential candidate before the Democratic National Convention of 1856, as he had

been in 1852. But he received practically no southern votes. They were cast for Mr. Buchanan. His northern support had been weakened by the withdrawal from the party of many men who had been his warmest political and personal friends four years before. If Mr. Douglas advocated the repeal of the Missouri Compromise from motives of personal ambition, he was woefully mistaken in his plan of campaign. He was not accustomed to make such mistakes in political tactics, and there is no reason to suppose he made one in this matter. The more reasonable and the only decently charitable view to take of his course is that it was controlled, as he himself declared it to be, by a sincere desire to settle the slavery question on a principle of universal application and thus to withdraw it from national politics.

When Buchanan received a majority of the votes of the Convention of 1856, his chief competitors being President Pierce and Mr. Douglas, every indication pointed to such a stubborn contest between Pierce and Buchanan for the two-thirds vote necessary to nominate, that Douglas' friends felt sure that the strength of one or the other would ultimately come to him as a second choice. Douglas sacrificed his personal ambition to consistency. He had always opposed the two-thirds rule and advocated nomination by a majority of the Convention, and he telegraphed his friends in the Convention that Mr. Buchanan having received a majority was entitled

to the nomination, and that his own name must be withdrawn, adding that the adoption in the platform of the convention of the principle of the Nebraska Bill accomplished all that he had in view in allowing it to be used.

Douglas lent efficient aid to Buchanan's election, but the inauguration of the new President in 1857 was scarcely over when his political courage, consistency and regard for principle were put to a severer test than had ever theretofore been applied to them, and that test continued to exist to the day of his death. Through it all he never flinched nor wavered, truckled nor concealed his thoughts in ambiguous words. With fearlessness and almost superhuman energy he fought throughout those three years for the principle of Congressional non-interference and popular territorial sovereignty against both the administration of his own party, backed by the solid slave-holding interest, and the swiftly growing anti-slavery sentiment of the North expressing itself in the Republican party. Finally, when the choice had to be made between the Nationalism for which he always stood, even in alliance with an anti-slavery administration, and longer forbearance, at the cost of dalliance with rebellion, he put that same courage and energy at the disposal of the Government, and rallied to instant support of the Union and the national authority millions of devoted followers. It seems but little short of midsummer madness, if it be not malignity, to say of such a man,



as Von Holst has done, that his career was consistently and continuously, demagoguery. Von Holst is more loyal than the prince and more papal than the pope. He cannot bring himself to approve of anything that John Quincy Adams disliked, but Adams would never have so characterized Douglas' senatorial career had he lived to see it.

The story of the quarrel of Douglas with Buchanan and the southern wing of the Democracy has been too often told for it to be justifiable to repeat it here at length, but a brief review of it is necessary. In March, 1857, the Supreme Court of the United States decided the Dred Scott<sup>8</sup> case, Chief-Justice Taney delivering the opinion of the court and each other justice filing a separate concurring or dissenting opinion.

It is easy for a lawyer to point out, as Douglas often did point out, that all that the case actually decided about slavery was, *First*, that "the Missouri Compromise," of which Douglas had secured the express repeal, was never valid, because unconstitutional, and *Second*, that a slave taken into a free state, held there as a slave, and then brought back into a slave state, was not free in the latter state by these changes of residence. In these propositions of law there was nothing to alarm or displease Douglas, whose doctrine had always been consistent therewith. He always declared, therefore, his entire acquiescence in the decision of the court. In-

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<sup>8</sup> Scott vs. Sandford, 19 Howard's Reports, 393.

deed, speaking in Springfield, Illinois, in June, 1857, of the decision and the severe criticism it was receiving, he declared that such criticism "was a deadly blow at our whole Republican system of government which, if successful, would place all our rights and liberties at the mercy of passion, anarchy and violence," a piece of *ad captandum* rhetoric unworthy of him, and which reads much like some of the similarly extravagant attacks upon the Democratic platform of 1896. Thus do parties in the exigencies of politics change positions! But there is plenty of evidence that Douglas was not really pleased with some of the opinions, whatever his view of the decision itself might have been. The anti-slavery people read into them, without violence to the sense, an approval of the doctrine that while Congress could not prohibit slavery in the territories, it was bound to allow it there and see to it that it was there protected. This doctrine was advanced with ardor by the southern Democrats. Douglas always denounced it vigorously. He declared, at every opportunity given him, his unalterable opposition to enacting a congressional slave code for the territories, and warned the southern senators that a Democratic candidate could never carry a northern state on any platform which proclaimed the duty of the Federal Government to force slavery on the people of a territory. He admitted that the doctrine of the court's opinion in the Dred-Scott case involved the right of a slave-

holder to take his slaves into the territories, but this right was but a barren and academic one, he maintained, for the territorial legislatures could grant or deny it protection by police regulations and other laws as they chose, and slavery could not exist an hour anywhere unless it was supported by local police regulations.

This went into political history as the "Freeport" doctrine, because in his debate with Lincoln in 1858, he had at Freeport answered a categorical question of Lincoln in this sense; but the southern outcry against Douglas and his "Freeport treason" to the Democratic party, as though they had been surprised by his position, was absurd and insincere. He had over and over again, since the Dred-Scott decision, announced it publicly in almost the same words. But in August, 1858, when the Freeport speech was made, there was a reason which had not existed in March, 1857, for the bitter denunciation of Douglas. He had definitely and defiantly broken with President Buchanan and with all his southern colleagues in the Senate on a matter of great practical interest and importance. They had tried, in opposition to the most elementary rules of justice and fair play, and in violation of the principles laid down by the Nebraska bill and by the Democratic platform of 1856, to force a constitution protecting slavery upon the newly organized state of Kansas, without submission to its people. The details of the conspiracy—for it was nothing less—it is un-

necessary here to recite. It is known to all who have taken a current or historical interest in the political events of that period. That which interests us is to know that Douglas fought the scheme and held fast to his principle of popular sovereignty in no paltering or double sense. His return to the senate was dependent on the results of the legislative elections in Illinois in 1858, and his chances for the Democratic nomination for the Presidency in 1860 hung upon the attitude of the southern Democracy towards him then. But although the Federal patronage in Illinois was unsparingly used against him because of his course, and the southern senators denounced him to their people as a disguised Abolitionist, he never hesitated. In the best speech of his life, made on March 22d, 1858, against the administration bill for the admission of Kansas, he declared in the senate that "neither the frowns of favor nor the influence of patronage would change his action or drive him from his principles, that private life had no terrors for him, and that official position had no charms for him when deprived of freedom of thought and action." He was beaten in the senate by the alliance of the Administration with the southern leaders, but the southerners could not pass the bill in the House without amendment. The amendment provided for the submission of the Constitution to the people and the Senate rejected it. In conference a substitute was adopted, which in effect provided for such a submission, but in such

indirect fashion and coupled with such conditions that Douglas denounced it as unfair and would have none of it. The conference Act passed, however, and the people of Kansas rejected the Lecompton Constitution by 10,000 votes to 2,000. Freedom had won in the first grapple with slavery under the Nebraska bill.

Then came the famous debate through Illinois between Douglas and Lincoln. Lincoln had been nominated for the Senate by a convention of the Republicans and the legislative elections turned upon his candidacy against Douglas. The Administration helped the Republicans, but it was to no purpose. The popular voice was with Douglas, and even to-day when one reads the speeches of the rivals, it is only when Lincoln rises, as only sparingly he does, to the discussion of the higher law, of the eternal principles of right and wrong, that the dialectic advantage, the greater readiness in debate and the more judicial logic of Douglas are not apparent. But Douglas had no answer which could satisfy the lovers of human liberty in Illinois, to these words of Lincoln:

The real issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent, is the eternal struggle between right and wrong throughout the world. These are the two principles that have stood face to face from the beginning of time. The one is the common right of humanity, the other is the divine right of kings. It is the spirit that says, you work and toil and earn bread and I will eat it. No matter in what shape it comes, whether from the mouth of a king

who seeks to bestride the people of his own nation, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.

Douglas was reëlected to the senate but returned to Washington to find his political friends therein hopelessly alienated from him, and that he had been deposed from the Chairmanship of the Committee on Territories. The "Freeport doctrine" was incessantly flung in his face by the southern senators under the lead of Jefferson Davis, who were busily engaged in attempting to formulate a platform for the Democratic Convention of 1860, which should uphold to the extremity their construction of the Constitution and the Dred-Scott decision. But he held his ground without giving way an inch, and in September, 1859, he appealed to the people through a carefully prepared article in Harper's magazine on Popular Sovereignty in the Territories and The Dividing Line between Federal and Local Authority, which attracted universal attention. It was distinctly juridical in tone, a legal and historical argument to prove his thesis, from which he never had deviated—that "In the matter of slavery, as in all other questions of local concern and internal polity, every distinct political community is entitled to the right of self-government, and this right can be exercised in a territory of the United States whenever there are inhabitants enough to form a government capable of performing its various functions and duties—the question of this sufficiency

alone to be determined by Congress." To all who would learn the exact position on slavery held by Douglas, with all its limitations and connotations, this article furnishes an authoritative exposition of it.

In the Senate he continued to uphold it against Democrats and Republicans, and in answer to his friends who asked if they should present his name to the convention which was to meet in Charleston in April, 1860, he replied, "Yes, if the principles of the Kansas-Nebraska Act and of the Democratic platform of 1856 are to be reasserted in the platform;" but he continues:

In the event there are to be interpolated into the creed of the party such issues as a Congressional slave code for the territories, or the doctrine that the Constitution of the United States either establishes or prohibits slavery in the territories beyond the power of the people legally to control it as other property, I could not accept the nomination if tendered to me.

The convention met. The southern delegates were irreconcilable and arrogant. Exasperated by their contempt for northern opinion, Shepley of Maine, afterwards a gallant Union soldier and still later a Circuit Judge of the United States, flung back to them the defiance of the Douglas following. "Remember, gentlemen," he cried,

"There are hills beyond Pentland,  
And friths beyond Forth!  
If there are lairds in the Southland,  
There are chiefs in the North!"

The convention adjourned in discord to meet at Baltimore in June. In the meantime Lincoln had been nominated by the Republicans at Chicago, and Jefferson Davis in the Senate had declared that Douglas had poisoned the whole land with his false doctrine of squatter sovereignty. When the Democratic Convention met again in Baltimore the breach was complete. Douglas wrote Richardson of Illinois, the leader of his friends in Baltimore, as he had been four years before at Cincinnati, to withdraw his name if the doctrine of non-intervention could thereby be maintained in the platform. "I cannot sacrifice the principle to obtain the Presidency, but I will joyfully sacrifice myself to maintain the principle," he said. The sacrifice would have been useless, and the letter was suppressed until after the southern delegates had seceded and Douglas had been nominated. Again in his letter of acceptance Douglas restated his position fully, and during the campaign, with all his pristine fierceness and vigor, north and south, east and west, he defended it and asked for it the support of Democrats. But he proposed no compromise and used no equivocation. Asked in Virginia whether if elected he would use coercion by arms to maintain the Union, he answered with a ringing and emphatic affirmative.

The seceding Democrats had nominated Vice-President Breckenridge on a platform framed on the extreme pro-slavery doctrine. Bell of Tennes-



see had been injected into the contest by old line Whigs, many of whom in the South really stood for the same ideas but disliked to avow them boldly. When Pennsylvania in the October election was carried by the Republicans, Douglas said to his comrades in the campaign, "Lincoln is the next President. I have no hope but to try to save the Union. Let us go to the South." To Alabama he went, in every speech exhorting and praying the southern Democrats to abide by the result of the election, whatever it might be, and to raise no fratricidal hands against the Union and the Constitution.

Lincoln was elected by 180 out of 303 electoral votes. Douglas was the second in the popular vote, but he had but twelve votes in the electoral college.

We have already noted what manner of man Douglas then showed himself to be. One has but to look at the files of the Chicago newspapers of the exciting days of March and April, 1861, to understand with what enthusiasm Illinois, although she had voted against him heavily in the Presidential contest, returned to something like idolatry of the son of whom she had always been proud when he came back to her with these inspiring words of patriotic fervor upon his lips:

When we shall have again a country with a United States flag floating over it and respected on every inch of American soil, it will be time enough to ask who and what brought all this upon us. It is a sad task to discuss questions so fearful as civil war,

but sad as it is, bloody and disastrous as I expect it will be, I express it as my conviction before God that it is the duty of every American citizen to rally around the flag of his country. Every man must be for the United States or against it. There can be no neutrals in this war, only patriots and traitors.

Stricken down with fatal disease almost immediately after his return, he died on the 3d of June, 1861, and was buried with "the mourning of a mighty nation" by the shores of Lake Michigan, where now stands his monument, far within the limits of the great city he loved well and which had often honored him. It was a strange fortune that six of his Congressional colleagues who delivered eulogiums upon him when Congress met again—Trumbull, Browning and MacDougal in the Senate, Arnold, McClernand and Law in the House—should have been of that brilliant coterie who more than a quarter of a century before had, like Lincoln, been his companions "struggling with poverty in a strange land." They had all in their chosen profession of the law risen to fame and influence.

And what was in the last analysis, the influence on events that Douglas had exerted? It is a hard question to answer. From the facts of his career each man may judge for himself. Of his sincerity of purpose and of his consistency to the principles which guided him, there is no reasonable ground of doubt to one who is not prejudiced. He swayed and led great masses of men because he was in accord with their genuine and practical patriotism,

their exaggerated estimate of the stability and perfection of American institutions, their resolute and determined energy in directing the country towards a great destiny of material and physical prosperity. He failed of the highest fame and of the affectionate regard of posterity because he lacked the insight into moral questions and the political idealism which springs therefrom, which the statesmen ranked among the immortals must always have.

Although he always wore the party name and ranged himself under the party banner of Democracy, a true Democrat in the larger sense of the word Douglas was not. The brotherhood of man, the federation of the world, the sanctity of natural rights, were ideas foreign to his mind and thought. Lincoln, who never bore the name of Democrat, Trumbull, who repudiated it when it bore the connotation of pro-slaveryism, were really Democrats, but not Douglas. His strongest political belief was in nationalism—patriotic and sincere nationalism,—but nationalism imperialistic and almost Chauvinist. He believed in autonomy for American communities; he cared but little what became of the rest of the world save as it might feed America's greatness. His strongest impress, perhaps, therefore, was made on the Democrats in name who voted with him and for him, and whose general practical cast of thought he expressed and illustrated in action.

He followed Jefferson in desiring territorial expansion, but he lacked Jefferson's idealism, which

will keep Jefferson far above him in the memory of future generations. He shared none of Jefferson's ideas about the natural rights of men or of the dangers of government. He admired and emulated Jackson's indomitable energy and will, but he broke even with the Democratic party when it followed Jackson's opposition to paternal government, by adhering to the strict construction of constitutional powers in the matter of internal improvements. Economic questions, such as methods of taxation and of tariffs, intimately connected though they were with the personal rights, the recognition of which are of the essence of true Democracy, seem to have interested him but little.

One thing, however, is clear. His training as a lawyer and a judge, brief as it was, left its lasting stamp on all his varied and important political action, and through him on the party which made him its leader. He is, in all justice, therefore, to be ranked as a great American lawyer.

MERCER BEASLEY.

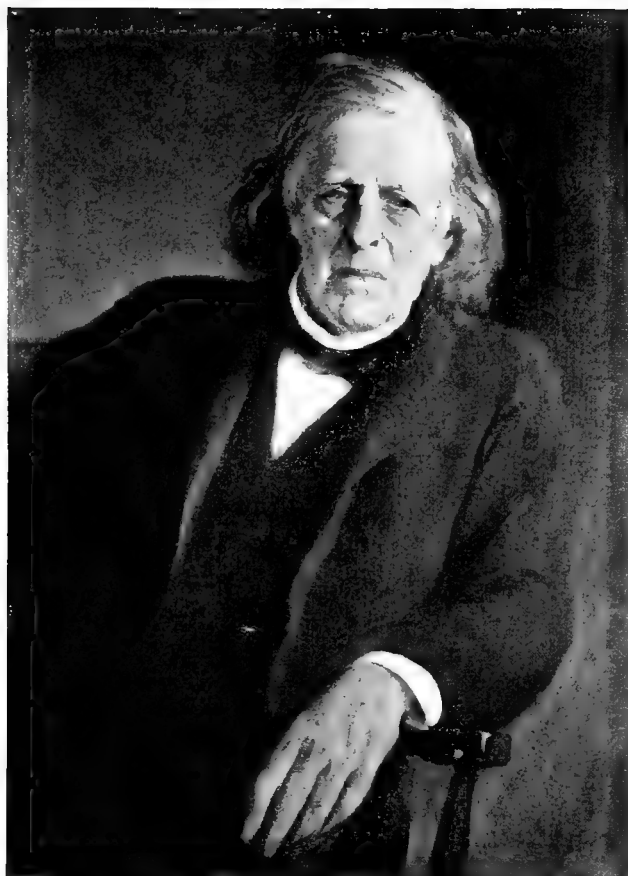


MERCER BEASLEY

From a painting by J. W. Alexander in the Court House at Trenton,  
N. J.









# MERCER BEASLEY.

1815-1897.

BY

JAMES J. BERGEN,

*Justice of the Supreme Court of New Jersey.*

**M**ERCER BEASLEY was appointed Chief-Justice of New Jersey in March, 1864, and served the state in that capacity until his death, February 19th, 1897.

Thirty-three years of judicial service is seldom accorded to one, yet this great jurist, nearly eighty-two years of age when he died, not only presided as chief-justice for a third of a century, but retained to the end, his most wonderful mental faculties; an opinion, the last written by him, being announced by his judicial associates the day before his death. The wear of time was able to undermine and weaken his physical, but not his reasoning powers; there was no period of senile mental decay; extinguishment of the light came only with death.

Entering upon his duties as chief-justice by a single step from bar to bench, his great ability and judicial capacity, at once attracted attention in a commonwealth, where the power and learning of his immediate predecessors, Chief-Justices Whelpley

and Green, had so recently been present and left impressions of legal learning, which set high the standard he must maintain. It is perhaps as high a compliment as we can pay to his greatness and skill as a judge, to say, that his advent to a bench occupied by most able, and unusually well-equipped common law judges, caused no confusion; there was no adjustment to a new condition necessary, nor assimilation of a foreign element required; without ostentation, but with quiet dignity, he took his place at the head of a most learned and honorable court, meeting all the requirements demanded by the high office, with the ease that ordinarily comes from experience only. He was always the courteous gentleman, whether dealing with his associates on the bench, or with the bar, but ever firm in adhering to his conception of a legal principle, and in the statement of his reasons, always logical, never plausible.

Under the Constitution of New Jersey, the court of last resort is composed of the chancellor, the judges of the Supreme Court, and six judges specially appointed; the judges of the Supreme Court by whom the case under review was determined below, not sitting. It thus became the constitutional duty of Chief-Justice Beasley to sit in the court of last resort, where he soon became, and until his death remained, a most potent factor, and during the latter years of his life, his chief work was in this appellant court, the great increase of the work there, demanding so much time, that most of the

*nisi prius* work was performed by judges provided by law for that purpose.

During the service of the Chief-Justice, the application of the common law to modern conditions, presented problems never dreamed of in the formative period of that great body of rules and customs, which were adopted, as each occasion arose, for the protection of life, liberty and property; and the necessary expansion and modification of the ancient rules of the common law, to meet new conditions, was, under his skilful construction and application, so gradual, and nicely fitted to meet the social, and commercial changes occurring during his official career, that it is difficult to point out any particular branch of the law upon which he left special impress. His life-work was rather the continuous brilliant performance of a duty, without spectacular or special instances, resembling the growth of a tree, which gradually puts forth the branches, twigs and leaves required to fulfil its mission, in the end presenting a well-rounded result.

The period during which he served, covered the most progressive era the world has known, so far as authentic history discloses and there were constantly presented to him new problems calling for the application of legal science with its nice distinctions, and the molding of the common law to meet the requirements of the constant growth of an active and energetic community. The Chief-Justice came to the bar when special pleading was the supreme

test of a lawyer's capacity, requiring as it does, a knowledge of the science of the law. In this branch he had no superior, with perhaps none to equal him during his generation, and his treatment of all questions relating to pleadings were ever clear, logical and convincing, and while a reading of his opinions might lead one to the conclusion, that he was too technical to be just, quite the contrary is the fact, for while inclined to strictness in the framing of an issue, and in requiring the rules of good pleading to be observed, in order that the issue might be clearly presented, he was quick to perceive the essential justice and right of a cause, and extremely alert in finding some legal principle to sustain the truth. It is reported of him, that on one occasion a newly-appointed judicial officer applied to him for suggestions regarding the due performance of his official duties, and was told "first ascertain which of the litigants has the right on his side, and when you are sure about that, find the law, as you always can, required to make justice prevail."

His first opinions as chief-justice, were filed in the November term of 1864, and from the beginning, he wrote in a pure and forceful English, which is retained throughout all of his written expressions. It is a great pleasure to read them, the logic and good English rendering them model legal essays; his mind was a mental machine that worked with the precision of faultless mechanism. He maintained that a statute must be strictly construed, and while

always ready to read the legislative will as written, if clear and unambiguous, and to enforce it without regard to consequences if framed within constitutional limits, uncertain and ambiguous, or unconstitutional laws had no respect or observance at his hands, but were fearlessly set aside.

While he was a firm believer in the sovereignty of his state, he entertained broad views regarding the constitutional rights of, and the obligation due to, the Federal Government, and in a well-considered case, in which he wrote the opinion within three years after his appointment, at a period when the powers of the National Government under its constitutional rights, were more strictly construed than in these later days, he held, that under the Constitution of the United States, the obligation imposed on respective states to surrender criminals, fleeing from the justice of another state, is not a matter of discretion, and that in the place of a spontaneous submission to the law of comity, usually observed between foreign sovereignties, there was substituted, as to the states of our Union, a rule of law, entitled to implicit obedience, and while the general government could not enforce the obligation against the executive of a state, because he was not a federal officer, he entertained, "no doubt of the power of Congress to vest in any national officer the authority to arrest in any state, a fugitive from the justice of another state, and to surrender such fugitive on the requisition of the executive of an-

other state," and expressed the opinion that the exceptions to the loyal observance of this particular clause of the Constitution, had been erroneously founded upon the idea, that the duty was one resting in discretion, when it is merely ministerial, and that every offense made indictable by the law of the state in which it was committed, was such a crime as justified a demand for the surrender of the criminal without reference to the policy, or laws of the state to which the fugitive had fled, and a right to demand being given, there existed a correlative obligation to deliver.

All offenses against the criminal laws of the state met his severe condemnation, and once convicted, the imposition of a sentence was never affected by the character, wealth, or standing of the offender; in the eye of the law, to him, all men standing at the bar of justice to receive a merited punishment, were equal, yet so strong were his notions regarding the liberty of a citizen, and his constitutional privileges, he would never permit the conviction of the defendant, if, in his judgment, there was a reasonable doubt of his guilt, within the proper legal definition of the term, and he seems to have had a notion, which appears unusual to most men, that criminal laws, being of a general character, should be subject to some exceptions. In passing upon an application by the Attorney-General for leave to *nolle pros.* an indictment for murder, where the defendant had been used by the state as a witness on the trial of his ac-



complice, the Chief-Justice said, "It is not every indictment that should be tried, and sometimes the public welfare requires, that even the guilty should be acquitted."

Which of two contending assemblies constituted the senate of the state was, because of its political features, perhaps, one of the most important causes in which the Chief-Justice was called to write the prevailing opinion. Two conventions of persons, claiming to have been duly elected and qualified to act as state senators, had met and organized, each body insisting that it was the constitutional senate of the state. The controversy arising over their respective assertions of regularity, each body being supported by its most active political partisans, excited an intense public interest throughout the state, and within that limited area, equaled in bitter partisan feeling and anxiety, that produced by the famous electoral commission of 1877. The result was a judgment adverse to the claims of the political party, to whose previous success and power, the Chief-Justice was indebted for the honorable position he had for so many years held by virtue of repeated appointments, for terms of seven years each, conferred upon him by Democratic governors. His personal and judicial integrity was never more brilliantly displayed, and the entire absence of personal ambition more clearly manifested, than by the few quiet and forcible words which he used to expose the fallacies of the arguments presented by the supporters of his

political party, who, while astounded and dismayed, by, to them, the disastrous consequences, being the complete overthrow of their party supremacy in the state, nevertheless at once acquiesced, and without serious protest, submitted to the judgment announced. The controlling question presented was, whether the senate of the state was a continuous body with a power resting in those of its members whose terms had not expired, to pass upon the qualifications of newly-elected members (the members holding over constituting only a minority of the whole), and to settle contested elections, without the participation or vote, of those of the newly-elected members, whose right to a seat was not in dispute. At the outset, the jurisdiction of the court was furiously assailed, upon the ground that the remedy sought was unconstitutional, in that it was an interference, by the judicial, with the legislative branch of the state government. The Chief-Justice, in the clearest terms, exposed the weakness of such contention, and maintained the jurisdiction of the court. In disposing of the questions between the contending parties he demonstrated that the senate of New Jersey was not a continuous body, in words so convincing and logical, that a fierce political contest, which had lasted for weeks, subsided in a day, and the legislative branch of the state government, became a normal quantity. Great as was the disappointment of his political partisans, not a whisper of unfairness, not a charge of disloyalty, nor an in-

timation that his purpose was other than exact justice, was heard, and the complete submission to his interpretation of the law by the most earnest of the defeated contestants, without recrimination, was a wonderful tribute to the esteem in which his purity of motive and great learning, was held by lawyer and laymen. This is not the place to discuss the merits of the controversy, nor would it now interest others than the actors on that, to them, memorable stage, the circumstance is mentioned only to illustrate the purity of the judicial character of the subject of this limited essay. His fertility of mind, and wonderful reasoning powers, justify the belief that he could have given plausible reasons, on a question so novel and fairly debatable, for a conclusion in sympathy with his political party, and thereby have compelled its grateful applause and future obligation, a temptation not always, I regret to say, resisted by the judicial mind. But with him personal advancement was never a pertinent consideration, and on no occasion was it allowed to disturb the logic of his thoughts, nor to lead him from the path of personal and judicial uprightness.

His fame as a jurist was not confined to the limits of the state over whose courts he presided with so much learning, dignity and culture, and the appreciation, which his talent and reasoning power deserved was accorded wherever his opinions were read, even in jurisdictions where his personality was unknown. It is reported that a citizen of New Jer-

sey, traveling in New Zealand, happened in one of its courts, and was surprised to hear counsel read, without explanatory remark, an opinion of Chief-Justice Beasley in support of the view of the law he was then urging the court to accept; the cogent reasoning presented by the Chief-Justice was so apt and persuasive, that the New Zealand court at once adopted the views expressed, and in the strongest terms, commended the lucid statement of the law, and the faultless deductions and conclusions of the Chief-Justice. It is, I believe, the consensus of opinion of those of his associates who served on the bench with him, that while his wonderful knowledge of the science of the law was most conspicuous, his greatness was enhanced by his extreme acuteness, and his ability to discern with exact correctness, the relation to facts of the legal principles to be applied, and to reach a result free from any future embarrassment, should he be called upon to decide another cause subject to conditions partially similar, but with distinctions that might lead to confusion, had the result in the earlier case been illogically expressed, or if in the working out of it, the possibility of slightly different conditions raising a doubt as to the correctness of the conclusion, had been overlooked.

It is not inappropriate to quote here from a recent letter regarding the Chief-Justice, written by Cortlandt Parker, Esquire, who was admitted to our bar in 1839, and has always been, and now is, in the

active practice of the law; perhaps to-day the one member of our bar who can proudly claim to have been continuously in the harness for over sixty-six years, one who knew the Chief-Justice, and argued as many, if not more cases before him than any other living advocate. Mr. Parker writes:

I recall one case in which I was engaged with him early in life while he was at the bar, it was a chancery cause, and I remember imbibing a high respect for him because of his familiarity with chancery law and practice, as disclosed in that cause. He had won a high reputation, and I was then satisfied he deserved it. It is understood that the recommendation of then Chancellor Green, formerly chief-justice, caused his appointment, though at that time it was scarcely known what his political opinions were, and indeed that ignorance remained to the end of his life. He was in no wise a party man, although generally acting with the Democratic party. With one consent he was regarded as fully the chief-justice. You will pardon me for thinking that very little of his greatness was due to the learning and ability of the bar of his earlier days; the reverse of that was nearer the truth, for his striking ability increased the force of the bar, and made its members better lawyers than they might otherwise have been.

While the work of the Chief-Justice in the appellate courts, is a matter of record and has brought him great renown, still among those who tried causes before him at *nisi prius*, it was often debated, in which forum his great abilities shed the stronger light; his power of segregating the important facts, and of dismissing or rejecting those not essential, tended to a dispatch of business, and the submission to the jury of the real issue, in a manner and form to

be comprehended by the simplest mind. His methods at the circuit wrought a revolution in the conducting of jury trials in the state, bringing about prompt, but just results, with economy to the litigant, yet it was well known that he was not fond of jury trials, and with wonderful tact and skill, generally managed to take and wield, all the responsibility himself, never hesitating to direct a verdict when the facts and the law justified it. Another element of his judicial character which ought not to be passed by, was the scantiness with which he cited authorities, for while he often, but sparingly, justified the result to which his reasoning powers led him, by referring to approved judicial decisions, it was usually done to illustrate a principle, rather than in actual support of his conclusion. He appeared to write the law as he reasoned it to be, upon the assumption that the principles he laid down were known, and would be conceded as logical deductions by the bench and bar, and a short sentence frequently contained a paraphrase of a long line of decisions. He entertained a great aversion to briefs with voluminous citations in support of a legal proposition, and frequently expressed his belief, that in most cases counsel had not examined them all, but cast upon the court the burden of such examination, and the elimination of those not pertinent. On one occasion a very near friend, a member of the bar, found him in his library at work, with desk, chairs, and floor covered with open books, and in reply to

an inquiry regarding the necessity for such an elaborate investigation, he held up a printed brief containing numerous citations of authorities and remarked, "a few decided cases, applicable to the point under discussion, would have been sufficient, and relieved me of much labor, because I must now, out of abundant caution examine them all, to ascertain those which are controlling." In the opinion which he filed in that cause, after citing a few authorities bearing on the issue, the irritation caused by the multitudinous references in the brief, found vent in the following sentence, "Other cases having the same bearing might be cited, but in these days when legal knowledge is so dearly acquired, and legal learning is so cheaply displayed, a voluminous citation of authorities is apt to look like a petit larceny on the digests."

His complete knowledge of the law was a marvel to those who came in contact with it. Every case opened before him, seemed to be familiar ground, and the principles applicable to it, as promptly at hand as if he had just prepared to argue it.

He indulged in very little of what is called light literature, a few of the best novels were read, but most of his spare time was devoted to the study of Spencer, Darwin, Huxley, and other works of science and philosophy, and his broad attainments made him a most delightful conversationalist.

His dignity of manner, simplicity of character, and purity of motive, coupled with his legal attain-

ments, made him a model judicial officer, one whose life work has left a monument to his memory that will outlast any granite shaft which loving friends or an appreciative public, may erect, and the incentive, which his learning and integrity has given to the bar of his state, to seek a higher level, both as to morals and learning, will live long after his personal influence over those of his day and generation has passed away; and when those who had the pleasure of his personal acquaintance, or lived within the light of his judicial life and deeds are dead, those who follow will venerate him as one of the great jurists of his age. We are all prone to overlook the greatness of friends, and to discount the ability of those of our own era, attributing to those of past generations superior learning and greatness; but in the case of the Chief-Justice, the bar and laymen of the day in which he lived, accorded to him the reverence and respect that his qualifications merited, and familiarity with his powers, did not breed a contempt of them.

He was born in Philadelphia in 1815; his father being then Provost of the University of Pennsylvania. Early in life he came with his father to reside in Trenton, New Jersey, where he spent the rest of his days. He entered Princeton University, but left that institution after his junior year, and began the study of the law, being admitted to the bar in 1838, and during a few years following his admission, owing to ill health, devoted a considerable portion of his



time to out-door sports, acquiring quite a reputation as a marksman, an accomplishment which he utilized after he became Chief-Justice, so far as his vacations would permit; but his lack of health and his sporting proclivities did not prevent him from acquiring, during the period immediately succeeding his admission, a thorough knowledge of the principles and science of the law. Instead of seeking clients, and closely following the routine practice of his chosen profession, he was establishing his health, and storing his mind with that wonderful fund of knowledge, which came as a surprise to those who had looked upon this quiet, plodding, unobtrusive student, as a young man more disposed to carry a gun and follow a dog, than to qualify himself for the practice of law, but once in the arena, his signal abilities were at once recognized, and he exhibited from the beginning, such a wonderful grasp of legal principles, that his services were immediately retained in the most important cases. Of a modest disposition and character, such as always accompanies true greatness, never seeking retainers, he exemplified to the utmost, the cardinal ethic of his profession, that the services of counsel should be sought, not proffered. During the latter years of his life he took up wood-carving as a pastime, and with the ardor of youth began the study and practice of that trade, soon becoming quite skilful, producing several fine specimens of furniture carved from mahogany, which are now treasured by his descendants as precious

heirlooms. He was subject to afflictions, which called forth the sympathy of his friends, but his sorrows were confined to his own breast, and he accepted the dispensations of providence without criticism or murmur, and died after a short illness, ripe with years, having borne an abundance of good fruit, respected and mourned, not only by the bench and bar, but by all the people of the state, whose jurisprudence has become famous because he lived.

**SAMUEL FREEMAN MILLER.**

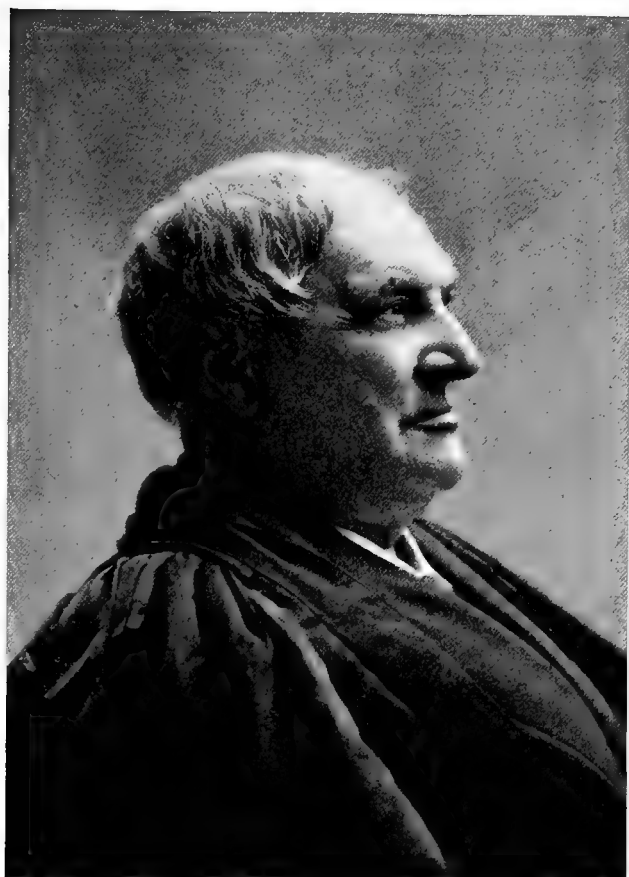


SAMUEL F. MILLER

From a photograph by Bell of Washington.











# SAMUEL FREEMAN MILLER.

1816-1890

BY

HORACE STERN,

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“**A** STURDY lad from New Hampshire or Vermont,” says Emerson, “who in turn tries all the professions, who teams it, farms it, peddles, keeps a school, preaches, edits a newspaper, goes to Congress, buys a township and so forth, in successive years, and always, like a cat, falls on his feet, is worth a hundred of these city dolls.” The type of successful American to which Emerson thus refers was more common in the days before the Civil War and immediately thereafter than it is now. The stalwart, sturdy statesman, brawny in physique, original in thought, pure in morals, gifted with common sense rather than with erudition, fighting his way to a life of influence through hardships of poverty that develop a self-reliant character and iron determination—such is the type that the great middle west furnished in many instances to the councils of the nation during the crucial days of the anti-slavery struggle and the time of reconstruction. Such was Abraham Lincoln himself, and such was Lincoln’s appointee to the

Supreme Court of the United States, Samuel Freeman Miller.

Miller's father was a German farmer who had emigrated to Kentucky from Berks County in Pennsylvania; his mother came of a family which had emigrated to Kentucky from North Carolina. Thus he was born of pioneer stock, and in a wild frontier settlement; for in 1816, the year of his birth, the State of Kentucky was but sparsely populated and lay on the very outskirts of civilization. His first years were spent on his father's farm, and until he reached the age of twelve he had no means of education whatever. On attaining that age he began attendance at the town school in Richmond, at the same time working upon the farm and living days of great toil and privation. [His general schooling was confined to a period of three years, for at fifteen he had to look around for a means of livelihood, and became a clerk in a drug store. This led to the growth of an interest in medicine, and he accordingly entered the medical school of Transylvania University at Lexington, now the University of Kentucky, whence, after two years' study, he graduated at the age of twenty as a physician. For the ten succeeding years he practiced medicine at Barboursville, a rude little hamlet of one hundred inhabitants in Knox County, in the Cumberland Mountains, near the Tennessee and Virginia state lines. His life continued during these years to be one of hardships. Practicing medicine is at best not

a sinecure, but in that day and in such a neighborhood it was extremely laborious. It involved long and tiresome journeys on horse-back, not unfrequently of twenty or twenty-five miles, through wild and rugged country, visiting patients whose material resources were not sufficient to furnish lucrative reward for the service. Most men would probably have struggled along for the balance of their lives in the rut into which he had entered. But Miller's energetic nature would not accept the limitations of his environment. The science of medicine itself did not appeal to him; it seemed to him, as it no doubt then was, not a science at all, but almost wholly empirical and untrustworthy, and he had no belief in the remedies which he was called upon to prescribe.

An accident turned Miller into a field for which, as the future demonstrated, he had far greater natural aptitude. It happened that his office was shared by a lawyer, and Miller occasionally read his associate's law books and became interested in the profession. At first he did this only sporadically and furtively, because he was afraid that his medical practice would suffer if it should become known that he was devoting himself to other studies; afterwards, however, he took up the work more systematically and fearlessly, with a view of being admitted to the bar. That he was gifted as a debater was proved to his own satisfaction by his efforts as a member of the village debating society, where the questions

of the day—and weighty questions they were—were discussed, and here Miller's power of quick comprehension and wonderfully logical mind caused him to shine among some who later—then members of this same society—attained high political position. In 1847 he was admitted to the bar, and was thus in his thirty-first year, married and the father of two children, when he entered upon the practice of the law.

From the very outset Miller had no chance of success as a practicing lawyer in Kentucky. In his political views he was a bitter opponent of slavery; his tendency was more and more toward the doctrine of gradual emancipation, and an abolitionist was regarded in that state as a kind of public enemy. Miller allowed no personal ambition to interfere with his whole-hearted devotion to the cause of freedom. When in 1849 the constitution of the state was to be revised, he announced his candidacy for delegate to the convention on a platform of avowed opposition to slavery; Silas Woodson, afterwards Governor of Kentucky, was a candidate in the same county on the same platform, and Miller withdrew in his favor in order not to divide the anti-slavery vote. Woodson was elected, but was the only anti-slavery delegate in the convention. The constitution adopted by the convention strengthened instead of weakened slavery; among other provisions contained in it was one authorizing the legislature to pass an act prohibiting emancipated slaves from re-

maining in the state.] Miller, who had determined to free his own slaves, realized that, if he did this in Kentucky, they might not be allowed to remain there. Furthermore he did not wish his children to be reared in the atmosphere of slavery, and for some time he had been considering the advisability of emigrating to a free state. Senator Crittenden, who happened to be making an address in the neighborhood, and whom he consulted, advised him (as public men are apt to give general advice to any stranger applicant) to go up into Iowa, which had but recently been admitted into the Union, and which, as Crittenden suggested, held out great promise to a young man of ambition and ability. Miller determined to act upon this advice, especially as hundreds of Kentuckians—Breckenridge, Hendershott, Chambers—had already preceded him, some of whom had taken part in the organization of the Iowa state government in 1846. Accordingly he migrated with his slaves to Keokuk, where he emancipated them, and then settled down with great earnestness to the practice of his new profession.

The city of Keokuk lies in a depression in the mighty bluff which lies along the western bank of the Mississippi, a short distance north of the mouth of the Des Moines River, in the southeasternmost corner of Iowa. In the days of the first westward immigration into this country, the settlers enthusiastically believed that Keokuk would be the great thoroughfare to the west and northwest, and gave it the

name of "the Gate City." It was a typical "boom" town, full of excitements of frontier life and activity, the most fantastic features of which gradually died away, leaving the city to develop more slowly and upon a healthier and more conservative foundation. Here Miller quickly achieved success at the bar—not a success, to be sure, that was startling or wholly unusual—but which brought him into prominence in the neighborhood in which he had settled. He was ambitious, extraordinarily studious, and, above all, possessed a remarkable capacity for work. He formed a partnership with a leading lawyer, his reputation gradually spread, and he began to practice not only in his home city but throughout the state and on the other side of the river, extending his journeys into Illinois as far as Springfield, where he probably first met and won the favor of Lincoln. He also became active in politics, and when the Republican party was organized he became one of its pioneer members in Iowa and gradually its recognized leader in the state. He never sought office, but preferred to devote himself to the law; indeed he declined numerous state and local offices which were tendered to him; once, after twice declining, he allowed himself to be nominated for the state senate, but, though leading his ticket, he was unable to overcome the large Democratic majority in the county.

In 1862 the Supreme Court of the nation, like the other departments of the government, was thoroughly disorganized. The ravages of the secession move-

ment had thinned the ranks of Congress, of the executive department, and even of the judiciary. Two vacancies existed on the Supreme Court bench, one caused by the death of Mr. Justice Daniel, the other by the resignation of Mr. Justice Campbell, who had espoused the Confederate cause. President Lincoln gave the subject of his appointments to these places much consideration, and the country was astonished when, in July, Miller was named to one of the vacancies. Not that his appointment was a mere personal whim on Lincoln's part; indeed Lincoln probably scarcely knew Miller; the lawyers of Iowa, Minnesota, Kansas and Wisconsin had urged his selection to the bench; Iowa had sent a delegation of its governor, senators and representatives to secure Miller's appointment; a petition in his favor had been signed by one hundred and twenty-nine out of the one hundred and forty representatives left in Congress after the secession movement, and by twenty-eight out of the thirty-two remaining senators; his name had been sent to the senate on the evening of July 16th, the day after the passage of the law reorganizing the federal judiciary, and the nomination had been there instantly and unanimously confirmed without reference to a committee, a compliment rarely paid to any one who has not formerly been a member of the senate. But Miller came from a new and comparatively remote state in the west, and besides he was not known to the country at large. He was not in any sense a national figure.

For the time and place his law practice had been a successful one, but at best it was somewhat obscure and not particularly remunerative. He was not even widely known to the more prominent statesmen of the nation. It is said that on the morning of the day on which he was to be commissioned, and while standing in the lobby of the old National Hotel in Washington, he happened to espy Senator Crittenden, who had originally advised him to migrate to Iowa. Miller went up to him and introduced himself as Mr. Miller, but Crittenden edged away and said that he was very busy. "But," said Miller, "I desire to thank you for some advice which once you were good enough to give me. When I was a young man, struggling for subsistence, I came to you as a mere stranger, and it was you who placed me in the path of my success." "Indeed?" said Crittenden, anxious to get away; "I am glad to learn that you have prospered; what are you doing now?" "Why," said Miller, "I am the Mr. Miller who is to be commissioned to-day as Associate-Justice of the Supreme Court." Crittenden was astounded. "Great God!" said he, "are you that man?"

Miller was forty-six years old when he assumed his seat upon the bench,—the first and the only public office which he occupied. His appearance was most striking; large, well built, with massive head, clear-cut features, and a pair of bright, penetrating eyes, nature had stamped him as one marked out for greatness. He was the kind of a man who could, if he de-



sired, readily make friends; in his sociable humors he was companionable, a good conversationalist, full of reminiscences and anecdotes, and with a broad sense of humor. [He had a strong and dominating will, and clung to his opinions with great tenacity. His frankness was his most prominent trait,—a frankness that often was not only tactless but sometimes bordered on the brutal. He hated shams and subterfuges of all kinds and had no patience with even the lighter forms of social hypocrisy. That he was intensely truthful, honest and incorruptible is beyond question; his integrity was never in the slightest impeached. Although inclined to be modest in the more personal phases of his nature, he was self-confident to an extreme degree; he acted according to his convictions with a profound indifference to the thoughts or actions of others. Perhaps it is not too harsh a criticism to say that his firm belief in the correctness of his opinions approached the vice of stubbornness. | Fortunately his judgments were usually right. It is good for an able man to be strong and domineering, and Miller possessed both of these attributes. The real kindliness of his heart often was not recognized because of a certain irritable gruffness in his outward demeanor, but this characteristic seems to be the usual concomitant of a life of hardship and struggle. Persons who were weak and sensitive quailed before his stern glance, his imperious manner, his rough behavior. If his views and his sympathies were as broad as the Iowa prairie upon

which he lived, and his character was built in the school of the virile west, it is likewise true that in the more superficial matters of social life he either was ignorant of or scorned to observe—perhaps considered as effete—the lighter touches of culture and gentleness.

Miller was not a man of profound learning, either in subjects of general education or in the literature of the law. His success as a lawyer and as a judge rested not upon his knowledge so much as upon his powers of reasoning, upon the machinery of his mind rather than upon the raw material which he was able to furnish to that machinery. He was not of a scholarly turn of mind; he was too impatient to obtain common-sense results, to delve into the obscure learning of the past. His intellect was so acute, and his logical faculties so keenly developed, that he relied largely upon his own ability to solve problems without reference to the wisdom of the older jurists. In short, the reason of the law was more important to Miller than a careful and technical adherence to the doctrine of *stare decisis*. He was a Marshall rather than a Story, a thinker rather than a compiler of the thoughts of others. To every question that presented itself he applied what may be called a legal “instinct,” so that when he had arrived at his solution of any problem he might well have said, “if this is not the law it ought to be.”

When Miller ascended the bench of the Supreme Court the country was in the throes of civil war.

New questions were arising to perplex the judiciary. The generation that had grappled with the problems of the legal and political phases of the slavery question had all but passed away. Taney was still Chief-Justice, but he was old and feeble and died soon after. Mr. Justice Wayne was the last survivor of the Court as constituted under the régime of Marshall. Webster, Clay and Calhoun were dead. The questions before the Court were no longer those of peace but of war—whether the Confederacy was to be treated as a belligerent, and if so its rights as such, the rights of neutrals, litigation concerning confiscation, prizes, blockades and non-intercourse, questions of the jurisdiction of military tribunals and of the suspension of the writ of *habeas corpus*. Above all were the problems of the financial legislation which was intended to sustain the armies of the government, questions of tax laws and of the right of the government to declare its paper money a legal tender for the payment of private debts. After the war was over came unique and still more important questions,—those concerning the reconstruction of the seceded states and the construction of the amendments to the Constitution which had been adopted as a result of the struggle. The years succeeding the reconstruction period were given over to the development of the material resources of the country and the settlement of the more western states, as well as the intensifying of the partisanship of politics, and as a result came other types of cases,—intricate ques-

tions as to the regulation of interstate commerce, of the telegraph and the transcontinental railroads, questions concerning the Indian wards of the nation, the status of polygamy among the Mormons, the anti-Chinese legislation, the constitutionality of the Enforcement Act, the Granger Cases and the control of public utilities, questions of the extent of federal control over Congressional elections, the power of the President to remove from office, the Virginia Land Cases, and Coupon Tax Cases, the power of the states to prohibit the liquor traffic, the repudiation of state debts and the true meaning of the eleventh amendment, the riots of strikers and the violence of the Chicago anarchists. We thus see that during the period when Miller was a Supreme Court Justice—from his appointment in 1862 to his death in 1890—that Court, under the successive leadership of Taney, Chase, Waite and Fuller, was called upon to decide problems, at first of political, and later of industrial, import, which were the gravest in the history of the country, second in importance to none, and ranking in that respect even with the questions of the nature and power of the Federal Government to the shaping of which Marshall had devoted the talents of the greatest of American jurists. It was an eventful period in our history—those twenty-eight years—but, fortunately for the nation, the Supreme Court was made up during the greater part of the period of strong men, notable among whom were Justices Miller, Bradley and Field, and, in

general, on constitutional questions, Miller dominated it.

The great source of surprise to one studying Miller's life and influence is the discovery of his conservatism and his breadth of view after his elevation to the bench. Neither of these qualities was to have been anticipated. It naturally was to be expected, and probably was expected by the country, that his opinions on constitutional questions would prove to be those of a radical Republican partisan, for such undoubtedly he had been in Iowa. It was to be thought that his bias would be strongly toward a centralized Federal Government with a corresponding denial to the state of the power to regulate and control the fundamental rights of the citizen. In the heat of the passion engendered by the war it was to be supposed that Miller on the bench would be the leading supporter of the drastic policies advocated by the members of his party in Congress, intemperately flushed as they were with victory. But, as in the case of Chief-Justice Chase, the jurist proved quite a different man from the politician. His weighty influence in the Court was always cast upon the side of moderation and the perpetuation unimpaired of the federal system, the indestructible union of indestructible states. So, too, the broadness of his views was not to have been anticipated. Neither his early environment, his education, nor his temperament would seemingly have pointed to a probability of other than intense but narrow convictions.

As the event proved, however, no one ever occupied a Supreme Court position with a broader horizon, both as to practical statesmanship and sympathetic humanitarianism. Instead of merely a locally successful Iowa lawyer there seemed to have been elevated to the bench one of those few great thinkers and statesmen who stand out in the history of their country as apparently foreordained to guide the destinies of their people for generations, rather than to work only for the particular period in which their own lives happen to be cast.

Leaving, then, from consideration the personal predilections of Miller, which undoubtedly were for the Federalist or Republican school, it is important to consider, as distinguished from and seemingly uninfluenced by these, his views of the federal system as disclosed by his judicial opinions. When the question was merely as to the existence of a certain power in the national government, irrespective of the existence of a similar power in the state governments,—that is to say, when the question was not one of the division of a certain amount of power between state and nation, but merely whether the Federal Government possessed such a power at all,—Miller's judgment was invariably in favor of the existence of the power in the National Government. In other words Miller believed that the central government should be construed to be a sovereign, puissant nation, leaving to Congress the question in each case of policy as to whether the power concerned

should actually be exercised. Thus in all of the Legal Tender Cases<sup>1</sup> Miller consistently took the view that Congress had the power to make its credit currency a legal tender in payment of debts. Here there was no question of states' rights at all; if the central government did not have the power it did not exist in our federal system. In *Springer vs. United States*,<sup>2</sup> Miller agreed with the Court's opinion construing an income tax as an excise or duty, and therefore that Congress had power to levy it. To have decided otherwise would have been to cripple the Government in its powers of financial legislation, and to have stamped the income tax laws of the war period as unconstitutional. In *United States vs. Stahl*,<sup>3</sup> and more directly in *Ex parte Hebard*,<sup>4</sup> Miller, in circuit court decisions, decided that under Article I, Section 8 of the Constitution, the Federal Government could for its own proper purposes directly exercise the right of eminent domain within the boundaries of any state, without first obtaining the consent of the state, such consent being necessary only in order to give Congress exclusive jurisdiction over the property thus acquired. This decision, although based apparently upon a violent and palpable departure from the plain language of

<sup>1</sup> *Hepburn vs. Griswold*, 8 Wallace's Reports, 603 (1869); *Knox vs. Lee*, 12 Wallace's Reports, 457 (1870); *Juilliard vs. Greenman*, 110 United States Reports, 421 (1883).

<sup>2</sup> 102 United States Reports, 586 (1880).

<sup>3</sup> 1 Woolworth's Reports, 192 (1868).

<sup>4</sup> 4 Dillon's Reports, 380 (1877).

the constitutional provision involved, was practically a necessary one in order to make the central government independent and self-sustaining, and was adopted by the Supreme Court in *Kohl vs. United States*.<sup>5</sup> In *Ex parte Milligan*,<sup>6</sup> Miller was careful to dissent from a *dictum* in the opinion of the Court which stated that Congress could not invest military commissions, organized during the Civil War, in a state not invaded and not engaged in rebellion, in which the federal courts were open and in the proper and unobstructed exercise of their judicial functions, with power to try, convict or sentence, for any criminal offense, a citizen who was neither a resident of a rebellious state, nor a prisoner of war, nor a person in the military or naval service. Miller, quick to apprehend the danger of denying to Congress any power the exercise of which might at some future day be advantageous and even essential, insisted that, although he believed that Congress had not given any such authority in this case, that body did have the power, when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety. To these cases might be added many

<sup>5</sup> 91 United States Reports, 367 (1875).

<sup>6</sup> 4 Wallace's Reports, 2 (1886).



others which would show, what undoubtedly was the fact, that Mr. Justice Miller passed with, or led, the Supreme Court through its three successfully widening views of the powers delegated to the Federal Government by the Constitution,—from the classical rule of Marshall, that if the end be legitimate, if it be within the scope of the Constitution, then “all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional,”<sup>7</sup> to the view advanced by the Court in the *Legal Tender Cases*<sup>8</sup> that Congress has certain powers, even if not expressly given or ancillary to any single expressly enumerated power, but merely resulting from the aggregate of the powers enumerated and necessary to effect the great objects for which the Government was organized, and thence to the final and extreme position assumed by the Court, that, irrespective of the constitutionally delegated or implied powers at all, there exist in the National Government such powers as inherently pertain to every sovereign nation and are necessary to its maintenance as such among the nations of the world.<sup>9</sup> As far, therefore, as this phase of the powers of Congress is concerned, Miller is unquestionably to be ranked among the very “broadest” of constructionists.

<sup>7</sup> *McCulloch vs. Maryland*, 4 Wheaton's Reports, 316, at p. 421 (1819).

<sup>8</sup> 12 Wallace's Reports, 457 (1870).

<sup>9</sup> *Chinese Exclusion Case*, 130 United States Reports, 581 (1888).

But it was in questions which involved the relative powers of the state and Federal Governments that Miller's remarkable conservatism, above adverted to, most clearly manifested itself. "While," said he, in the oration delivered by him in Philadelphia in 1887 upon the occasion of the one hundredth anniversary of the framing and promulgation of the Constitution, "the pendulum of public opinion has swung with much force away from the extreme point of State's Right doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the states and of the General Government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country, and to its existence for another century, as it has been for the one whose close we are now celebrating." Trite and axiomatic enough such a sentiment seems to us now, since the Slaughter-House Cases,<sup>10</sup> have definitely and for all time fixed the status of our Government as a Federal Union, but it is to Miller's opinion in that case, from which such men of radically diverse views as Bradley and Field both dissented,<sup>11</sup> that the states almost wholly owe their present existence and integrity. The Slaughter-House Cases constitute one of the great landmarks in the history of American constitutional jurisprudence. There is no single decision of Chief-Justice Marshall which approaches it

<sup>10</sup> 16 Wallace's Reports, 36 (1872).

<sup>11</sup> Mr. Justice Swayne also dissented from the opinion of the court.

in importance. It defined what the Civil War had accomplished. It said to the Nationalists: "this is the extent of your victory." It stayed once and for all time the onrush of the centralizing tendency which naturally resulted from the defeat of the Confederacy, and there is not the slightest doubt that if it had been decided otherwise the state governments would have lost their autonomy and become only of historical interest.<sup>12</sup> And this was the opinion of a man who had been one of the pioneers of the Republican party!

The Slaughter-House Cases involved a construction of the fourteenth amendment to the Constitution. That amendment had provided that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

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<sup>12</sup> John S. Wise of Virginia, in reply to the toast "The American Lawyer," at a breakfast to the justices of the Supreme Court of the United States given by the Bar of Philadelphia on September 15, 1887, said of the decision in this case: "I said that we owed more to the American lawyer than to the American soldier, and I repeat it; for not all the victories of Grant, or all the marches of Sherman, have by brute force done as much to bulwark this people with the inestimable blessings of constitutional liberty as that one decision of the Supreme Court in the Slaughter-House Cases, declaring what of their ancient liberties remained. That decision, worthy to live through all time for its masterly exposition of what the war did and did not accomplish, did more than all the battles of the Union to bring order out of chaos. . . . When war had ceased, when blood was stanchd, when the victor stood above his vanquished foe with drawn sword, the Supreme Court of this nation, when it spoke in the great decision of the Slaughter-House Cases, planted its foot and said: 'This victory is not an annihilation of State Sovereignty, but a just interpretation of Federal Power.'"

States." The question in the case was whether the right to engage in a legitimate business was a "privilege" of "citizens of the United States," and therefore could not be prohibited by a state. It is evident that if it was held to be such a privilege and therefore within the cognizance, control and protection of the Federal Government, it would result that all the ordinary rights of a member of an organized political community, all the fundamental civil rights for the security and establishment of which society is founded, would be under the jurisdiction of the nation, all state laws concerning them would be subject to federal supervision, all decisions of the state judiciaries in respect to them would be reviewable by federal tribunals, and Congress could legislate and provide a uniform system for their enjoyment, their limitations, and their protection. But Miller's opinion practically was to the effect that this clause of the fourteenth amendment added nothing new to our political and judicial system; it accomplished nothing that was not already implied in the federal system. He held, in an elaborate opinion which reviewed the history and purpose of the then recent constitutional amendments, that by privileges of citizenship of the United States, as distinguished from citizenship of the state, were meant those only which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof,—such, for example, as the right to

travel to the seat of Government and the ports of the United States, as well as its courts, sub-treasuries and land-offices, the right to protection when on the high seas or within the jurisdiction of a foreign government, the rights of personal liberty guaranteed by the "Bill of Rights" or original constitutional amendments, the right to use the navigable waters of the United States, together with such rights as were secured to our citizens by the provisions of treaties with other nations. He thus kept clearly distinct, intact and unimpaired the privileges of citizens derived from their state governments, which were still to be within state control and beyond the pale of Federal interference. Miller was very proud of his opinion in the *Slaughter-House Cases*, and well he might be, both for its intrinsic merits of thought and style, as for the importance of the doctrine which it enunciated. Many of his later opinions,<sup>13</sup> and the opinions of other members of the Supreme Court<sup>14</sup> construed the same amendment and covered the same general subject-matter, but all of them closely followed the precedent which he had thus established.

In questions involving the construction of the interstate commerce clause is to be found another instance of the tendency of Miller to seek a fair and practical division of power between the Nation and

<sup>13</sup> For example, *Bradwell vs. The State*, 16 Wallace's Reports, 130 (1872); *Bartemeyer vs. Iowa*, 18 Wallace's Reports, 129 (1873).

<sup>14</sup> *Minor vs. Happersett*, 21 Wallace's Reports, 162 (1874); *United States vs. Cruikshank*, 92 United States Reports, 542 (1875); *Mugler vs. Kansas*, 123 United States Reports, 623 (1887).

the states. He was heartily in accord with the doctrine laid down in *Cooley vs. Board of Port Wardens*,<sup>15</sup> and *Gilman vs. Philadelphia*,<sup>16</sup> that in matters of national concern Congress was to have exclusive jurisdiction over the regulation of interstate commerce, whereas in matters of purely local concern the states were to have a jurisdiction concurrent with that of Congress, the legislation of the states to be valid until action of Congress over the same subject-matter superseded it. In applying this general test, however, Miller's mind gradually came to lean rather strongly toward the strengthening of the power of Congress by holding most questions of interstate commerce to be of national concern and therefore beyond the possible interference of state action. Notable among his opinions on this subject—he probably wrote more opinions construing the commerce clause of the Constitution than did any other Supreme Court justice—was the case of *Crandall vs. State of Nevada*,<sup>17</sup> in which he held unconstitutional an act of Nevada which attempted to levy a tax of one dollar on every person leaving the state by a public conveyance, the transportation company to collect the tax. Curiously enough he decided this case, however, which represented his first treatment of the question, not on the ground that the state act trespassed on the exclusive jurisdiction of Congress,

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<sup>15</sup> 12 Howard's Reports, 299 (1851).

<sup>16</sup> 3 Wallace's Reports, 713 (1865).

<sup>17</sup> 6 Wallace's Reports, 35 (1867).

for he did not believe that the subject-matter of the legislation was one of national import, but rather on the basis of a right existing in the citizens of the nation to travel without hindrance or impediment to the seat of government, the public offices, and the ports of entry of the United States, a right which, as has been seen, was later in the Slaughter-House Cases, classified by him as one of the rights of federal citizenship, and, as such, under the control of the Federal Government. The invalidity of the act of Nevada arose, according to his view, from the nature of our system of government, and it was unnecessary therefore to seek to base its unconstitutionality upon its violation of any specific clause of the Constitution. In his next commerce decision,<sup>18</sup> he holds valid a state act imposing a tax on sales at auction and other sales of merchandise, even though such tax might affect the sale in their original packages of products of states other than that of the state levying the tax. This decision, which undoubtedly has since been repudiated by the Supreme Court, was placed on the ground that no attempt had been made in the act to discriminate against the products of other states. But after Miller had been somewhat longer on the bench, and as the interstate commerce of the country grew, after the Civil War, to such an enormous volume, he, always above all other things eminently practical, shaped his views, while maintaining the general theory of the division of power be-

<sup>18</sup> *Woodruff vs. Parham*, 8 Wallace's Reports, 123 (1868).

tween Congress and the states, toward a greater centralization of the power to regulate this interstate trade. He had begun to study carefully the evils of the Government under the Articles of Confederation, and seems to have become much impressed at this time with the possibility of a repetition of its disastrous experience due to any rights which the states might be construed to have to tax interstate commerce. Accordingly we find him dissenting, in 1872, from the Court's decision in the matter of the State Tax on Railway Gross Receipts,<sup>19</sup> the majority opinion sustaining the validity of a state statute which imposed a tax upon the gross receipts of railroad companies within the state, although such receipts might be in part derived from the transportation of freight carried by the railroad from within the state to another state or from another state into the state levying the tax. "I lay down the broad proposition," he said, "that by no device or evasion, by no form of statutory words, can a state compel citizens of other states to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that state by the ordinary channels of commerce." So, too, he dissented a couple of years later from the opinion in *Railroad Company vs. Maryland*,<sup>20</sup> in which the Court held constitutional a state act imposing a tax on railroad companies of a certain percentage of the amount received from

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<sup>19</sup> 15 Wallace's Reports, 284 (1872).

<sup>20</sup> 21 Wallace's Reports, 456 (1874).



the transportation of passengers. From then on, all of his opinions were strongly directed against the allowance to any state of the right to impede or to derive a revenue from interstate or foreign traffic, and we have from his pen a whole series of such opinions maintaining this purpose and striking at state acts which sought to evade these views, no matter in what form they presented themselves.<sup>21</sup> At the same time he was always careful not to become an extremist, and maintained his conservative position by protecting the states in the exercise of the power to regulate commerce to the extent to which it was either not interstate at all, or amounted merely to tax legislation for the purpose of maintaining inspection laws, privileges of wharfage and the like. Thus in *Pound vs. Turk*,<sup>22</sup> he held constitutional an act of a state which authorized the erection of a dam across a navigable river wholly within the state, Congress not having legislated in the matter. In *Packet Company vs. Catlettsburg*,<sup>23</sup> he sustained the validity of an ordinance which, in the absence of legislation by Congress, imposed a reasonable wharfage tax upon ves-

<sup>21</sup> *Henderson vs. the Mayor of New York*, 92 United States Reports, 250 (1875); *Chy Lung vs. Freeman*, 92 United States Reports, 275 (1875); *Cook vs. Pennsylvania*, 97 United States Reports, 566 (1878); *People vs. Compagnie Générale Transatlantique*, 107 United States Reports, 59 (1882); *Wabash, St. Louis and Pacific Railway Co. vs. Illinois*, 118 United States, 557 (1886); *Fargo vs. Michigan*, 121 United States Reports, 230 (1886); *Western Union Telegraph Co. vs. Alabama State Board of Assessment*, 132 United States Reports, 472 (1889).

<sup>22</sup> 95 United States Reports, 459 (1877).

<sup>23</sup> 105 United States Reports, 559 (1881).

sels, proportioned to their tonnage, and forbade them, under a penalty, to land at any point within the corporate limits of the city collecting the tax other than the public wharf or landing. In *Morgan vs. Louisiana*,<sup>24</sup> he decided in favor of the constitutionality of certain quarantine laws of Louisiana, which, among other provisions, required all vessels passing a quarantine station to pay a stipulated fee covering the costs of examination as to their sanitary condition. And, finally, in *Ratterman vs. Western Union Telegraph Co.*,<sup>25</sup> where an act of the state of Ohio imposed a tax upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the state, Miller held that the act was invalid only in so far as the tax was levied upon the receipts derived from interstate commerce, and therefore that the federal courts could not enjoin the collection of the tax upon the portion of the receipts which arose wholly from commerce carried on within the state. Miller's position on the interstate commerce clause therefore was that to which the Court had begun to tend immediately prior to his elevation to the bench, and his great work was to apply this general principle to the cases that arose in all their varying aspects. Miller made of the theory a working doctrine. Clearly there is no logical justification for it in the Constitution; it was manufactured as the best possi-

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<sup>24</sup> 118 United States Reports, 455 (1885).

<sup>25</sup> 127 United States Reports, 411 (1888).

ble practical system,—the one most adapted, because of its elasticity, to our federal system of government. As such Miller's practical mind approved of it without questioning its theoretical tenability, and his applications of it allowed the commerce of the country to develop along healthy lines, unimpeded on the one hand by the selfish and sordid legislation of the states, and on the other by the dangers of a too general and unelastic system prescribed by Congress but not adapted to the varying needs of particular local communities.

There is one phase of Mr. Justice Miller's views on commerce in which he appears strikingly foresighted and modern, and which illustrates his remarkable ability to grapple successfully with new and intricate problems by applying to them practical and common sense solutions. The trust problems of our day can scarcely be said to have existed in Miller's time, but the railroads at least were already then potent and dangerous examples of the evils that were likely to follow from the aggregation of immense amounts of capital in control of public and *quasi*-public utilities. To Miller is due the credit of being the official inventor of the now well established doctrine that all railroads doing an interstate business are, as instrumentalities of commerce, under the direct supervision and control of Congress. This theory was promulgated in the decision of the case of *The Clinton Bridge*,<sup>26</sup> argued before Miller

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<sup>26</sup> 1 Woolworth Reports, 150 (1867).

in the Circuit Court, and which was affirmed by the Supreme Court without, however, a full adoption by the Court at that time of Miller's opinion. But Miller's views in this case were frequently quoted in Congress in regard to the power of that body to regulate railroad traffic, and subsequently not only were adopted in their entirety by the federal judiciary, but their principle was applied also to the case of the telegraph lines,<sup>27</sup> and thus led to a vesting in Congress of the power of regulation both as to management and the fixing of rates of both of these vast utilities. As to the power of the individual states to prescribe the maximum rates to be charged by common carriers, Miller, in his concurring opinion in the case of *Chicago, Milwaukee and St. Paul Railway Company vs. Minnesota*,<sup>28</sup> gives in a few categorical and concise propositions his views of the extent of such power, and these views, dealing with a subject now well determined by the law, but then almost in the first process of formulation, are in many respects as accurate an exposition of current law as if they constituted the latest judicial utterance upon this question,—holding as they do, that the state legislature may establish the rates of carriage to be charged by railroads within the state, that the legislature may exercise this power through a commission, that the rates thus established may not

<sup>27</sup> *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 United States Reports, 1 (1877).

<sup>28</sup> 134 United States Reports, 418 (1889).

be so arbitrary and unreasonable as to destroy the value of the property of the carrier or be in disregard of the rights of the public, that if they are thus arbitrary and unreasonable the party aggrieved has an ultimate remedy in the courts and especially in the federal courts because of the consequent deprivation of property without due process of law, that until, however, such appeal is taken the tariff of rates so fixed is the law of the land and must be submitted to by all parties, that it is not necessary for either the legislature or a commission authorized by it to give previous notice to all common carriers of the rates to be established, but that when the question becomes a judicial one and it is incumbent upon the court to decide as to the reasonableness of the rates thus established it is necessary that the railroads interested in such rate should have notice and the right to be heard.

Wherever a case presented to the Court involved the powers and dignity of the state without involving the relative powers of Congress and the states, Miller always upheld the state, for, as already stated, he was as much of a believer in a state's sovereignty within the bounds of its own jurisdiction as he was of the sovereignty of the Nation in questions over which the Federal Government properly had control. He was as jealous of the majesty of each state as he was of that of the United States. He was as eager to preserve to each commonwealth the great essential powers of government as he was that the Central

Government should not be handicapped in its operations by so construing the Constitution as to deny to Congress any fundamental powers. For example, he persistently maintained that no state should be allowed to alien its power of taxation any more than it could part with its police power or with its right of eminent domain.<sup>29</sup> In *New Jersey vs. Yard*,<sup>30</sup> he says:

The writer of this opinion has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit.

Indeed he first gained a reputation on the bench by his championing the dignity of the individual states by asserting that the federal courts ought invariably, in the construction of state statutes, to follow the decisions of the state courts even in cases where the latter courts reversed their original opinions, and one of his early dissents was to the judgment of the Court in *Gelpcke vs. Dubuque*,<sup>31</sup> which maintained the contrary view. In cases arising under the eleventh amendment he was always inclined to construe the amendment broadly, so that under

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<sup>29</sup> Dissenting opinion *in re* Washington University vs. Rouse, 8 Wallace's Reports, 439 (1869), and *in re* Hartman vs. Greenhow, 102 United States Reports, 672 (1880). For his views on the inalienability of the police power, see his opinions in the leading cases of *Butchers' Union Company vs. Crescent City Company*, 111 United States Reports, 746 (1883).

<sup>30</sup> 95 United States Reports, 104 (1877).

<sup>31</sup> 1 Wallace's Reports, 175 (1863).

no guise or evasion whatever it would be possible for suit to be brought against a state without its consent.<sup>32</sup> It was only in cases in which the assumption of full authority by the state would have weakened and decentralized the federal system that his supreme loyalty to the National Government overrode his allegiance to the individual commonwealths which composed it.

Miller was a strong believer in the rights of the individual. His opinions are filled with eloquent passages on this theme. Like most lawyers brought up in the vigorous and hopeful West, and not impregnated with the cynicism of eastern city life, he looked with a feeling akin to reverence upon the great bulwarks of Anglo-Saxon personal liberty,—the right of trial by jury, the privilege of the writ of *habeas corpus*, and all the other vital principles of justice wrested from tyranny by Magna Charta and the Bill of Rights and written into our state and federal constitutions. Even the great bent of his disposition to be practical wavered in specific cases involving these fundamental rights. Before the glitter of these general safeguards, probably the subject of his first studies of the law, he swept aside all other considerations, and in some cases went to an extreme observance of technicality in so doing which subjected him at times to criticism. "There is no more sacred duty of a court," he says in *Ex parte*

<sup>32</sup> Dissenting opinion in *re Virginia Coupon Cases*, 114 United States Reports, 269 (1884).

Lange,<sup>33</sup> "than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or liberal construction should be given to the words of the fundamental law in which they are embodied." But in many instances Miller gave what many would consider to be too broad and liberal a construction of such law. In this very case of *Ex parte Lange* his opinion is to the effect that when a court has, in a criminal proceeding, imposed a fine of \$200 and imprisonment of one year, where the statute of Congress under which the proceedings were held, conferred power to punish only by a fine of not over \$200, *or* imprisonment of not over one year, and the fine thus imposed has been paid, the court cannot modify its judgment by imposing a punishment of imprisonment instead of the fine; to do so would be to render a second judgment on the same verdict and to put the person into a second jeopardy. The Court accordingly ordered the discharge of the prisoner. But a much more extreme illustration of Miller's attitude on this subject is to be found in the case of *Kring vs. Missouri*.<sup>34</sup> Kring was indicted on a charge of murder, pleaded guilty of murder in the second degree, and was sentenced to an imprisonment of twenty-five years. By the law of Missouri

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<sup>33</sup> 18 Wallace's Reports, 163 (1873).

<sup>34</sup> 107 United States Reports, 221 (1882).



in force at the time the crime had been committed, such a sentence operated as an acquittal of the charge of murder in the first degree, but before Kring had actually put in his plea this law had been amended so that thereafter it was provided that if a judgment on a plea of second degree murder be lawfully set aside it was not to be held an acquittal of the higher crime. Kring appealed from his sentence, which was reversed and set aside, but at the second trial he was convicted of murder in the first degree, and this second judgment was affirmed by the Supreme Court of the state. The Supreme Court of the United States, in an opinion delivered by Miller, held that the act amending the original law was *ex post facto* as far as Kring was concerned, and that he could not therefore properly have been tried the second time on a charge of murder in the first degree. So also in *Ex parte Medley*,<sup>35</sup> another murderer was set forth on the community by Miller's close and technical observance of the prohibition of *ex post facto* laws. The act in that case which he held unconstitutional as to the prisoner was one which made merely slight changes in the mode of his imprisonment, as, for example, that he was to be confined in solitary imprisonment until his execution and giving power to the warden of the penitentiary to fix the date of execution, and compelling the warden to withhold from the prisoner knowledge of the date thus fixed. It was one of the few instances in which

<sup>35</sup> 134 United States Reports, 160 (1889).

Miller sought to be right from the standpoint of theory rather than of practical efficiency. But however great may have been the artificiality and technicality of these decisions, certainly no one can deny that in many other cases Miller rendered valuable aid to the protection of liberty and property. No one can doubt the wisdom, the breadth, and the far-reaching importance of such a decision as that rendered by him in *Pumpelly vs. Green Bay Co.*,<sup>36</sup> in which it was held that a provision forbidding the "taking" of private property for public use without just compensation covered cases of an interference with the beneficial use of one's property as well as an actual taking of it; or again as that rendered in *Kilbourn vs. Thompson*,<sup>37</sup> in which the power was denied to Congress to punish for contempt a witness summoned before it who refuses to answer questions asked him in the course of an investigation made by Congress other than in impeachment proceedings, or the determination of contested elections, or the examination of the qualifications of one of its own members or the like; or again as that contained in his opinion in *Loan Association vs. Topeka*,<sup>38</sup> in which an act purporting to authorize a city to issue its bonds in aid of the manufacturing enterprise of a number of individuals was held unconstitutional on the ground that there are "implied reservations of in-

<sup>36</sup> 13 Wallace's Reports, 166 (1871).

<sup>37</sup> 103 United States Reports, 168 (1880).

<sup>38</sup> 20 Wallace's Reports, 655 (1874).

dividual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name," and that "to lay with one hand the power of the Government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation." Such cases as these firmly established Miller's position as a great constitutional jurist and as one who contributed perhaps a larger share than any other American judge to the preservation of the liberties of his people.

It would be well-nigh impossible to enumerate even the names of the many famous constitutional law cases in which Mr. Justice Miller acted as the spokesman of the Court. In the seventy volumes of reports in which his opinions are contained, from 2 Black to 136 United States, there are over six hundred of his opinions, exclusive of dissenting and concurring opinions, and a large proportion of them deal with questions of construction of the Constitution. Indeed it has been asserted that no other Supreme Court justice has written as many opinions as Miller involving decisions in constitutional law. His work covered every field of that subject, while in addition his decisions embraced the usual subjects of jurisprudence which present themselves to the Supreme Court,—patent cases, cases of admiralty and maritime jurisdiction, mining cases and ques-

tions concerning the grants of the public lands; also cases arising from the federal jurisdiction over disputes between citizens of different states, which at that time were appealable to the Supreme Court, and which of course covered in their scope all possible phases of the common and statute laws of all the states. When it is remembered that he also performed his duties as a Circuit Justice in the eighth circuit, consisting, in his later years, of the States of Iowa, Kansas, Minnesota, Missouri, Arkansas, Colorado and Nebraska, and at one time of Wisconsin as well, it will be realized what a great worker Miller was. His powers seemed inexhaustible. He had, it is true, but few social duties to distract him from his work, but even when not engaged in his official labors he devoted himself to other intellectual pursuits, lecturing, for example, on constitutional law before the students of the Law School of the National University in Washington, and pursuing other studies and reading. He was a member of the Electoral Commission established in 1877, to decide the Hayes-Tilden contest for the Presidency; indeed it is said that it was he who virtually decided the question by his promulgation of the doctrine that Congress had no authority to "go behind the returns," and that the votes of the electors certified by the proper state officials must be the ones officially accepted. Miller, for many years prior to his death, was the senior associate-justice of the Court, and on two occasions, once in President Grant's and again

in President Cleveland's administration, he was seriously considered for the chief-justiceship, but the custom of not appointing to that office persons already members of the Court was not changed, although his domination of the Court was such that he exercised quite as much influence as if he had been chief-justice in name.

It is not wholly fair to Miller to picture him as a mere logician and a thinker of ability but as one devoid of what might be termed literary culture. It is somewhat customary to speak of Lincoln as a man of power but of little education but we know that no one who had not made himself a master of the purest English models of style could have delivered orations ranked among the world's masterpieces of classical diction. So it was with Miller. Brought up as he was in an environment offering little encouragement to the pursuit of learning, and thrown as he was from his earliest childhood on his own resources, he nevertheless must have read widely enough to have acquired no insignificant fund of information and to have given himself the mastery of a faultless English prose. He was not in any sense a narrow-minded backwoodsman who despised the study of the classics. On the contrary he believed that no lawyer could be a really great jurist unless he had a liberal education as the basis of his technical profession.<sup>39</sup> His own style is of the so-called clas-

<sup>39</sup> See his address before the Iowa State Bar Association at Des Moines, May 13th, 1879, *Albany Law Journal*, vol. XX, 25.

sical type, simple, direct, concise, and breathing in its every quality Miller's remarkably forceful nature, his great vigor, energy, frankness and power. His opinions abound with brilliant passages of rhetorical fervor, filled with a sincere confidence in his own convictions, and exemplifying the aggressive attitude of a man who never doubts that he is right. What could be more eloquent than when he writes, in *United States vs. Lee*:<sup>40</sup>

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives. Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government; and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has

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<sup>40</sup> 106 United States Reports, 196 (1882).

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no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal right.

Or when, in *Ex parte Yarbrough*,<sup>41</sup> he says:

It is as essential to the successful working of this Government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption. In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources. If the recurrence of such acts as these prisoners stand convicted of, are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety. If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

Such quotations from Miller's opinions serve to il-

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<sup>41</sup> 110 United States Reports, 651 (1883).

illustrate not only the literary qualities of his style, but also the method of his reasoning, not only his oratorical vehemence, but likewise the powerful manner in which he employs his favorite method of the *reductio ad absurdum*. As has been already intimated he was not concerned to a large extent with the law as a historical science. Law to Miller was logic, not a survival of the customs of former ages nor the refined reasonings of deceased scholastic judges. It is characteristic of his bent of mind that he should say at the close of one of his opinions:<sup>42</sup> "This is the honest and fair view of the subject, and we think it conflicts with no rule of law;" and in another:<sup>43</sup> "While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day; . . . and as I have had no opportunity to examine the authorities cited in the opinion, I can do no more than protest against the doctrine."

When Miller wished to decide a question of law he did not hasten to the authorities and diligently search among them for the solution of the problem confronting him, but he reasoned out by himself what justice and common sense demanded, and then, unless overwhelming authority to the contrary was

<sup>42</sup> Pettigrew vs. United States, 97 United States Reports, 385, at p. 389 (1878).

<sup>43</sup> Dissenting opinion in *re* Trustees vs. Greenough, 105 United States Reports, 527, at p. 538 (1881).



brought to convince him that the conclusion which he had reached was not in accord with the law, he adopted the result of his own deliberations as final. What he sought was the sensible view of the matter and the one which would produce the best practical results. Theories, technicalities, refinements of reasoning did not appeal to him. When the question was, in *Texas vs. White*,<sup>44</sup> whether Texas was a state and could, as such, maintain an original suit in the Supreme Court of the United States, Miller had no patience with the carefully evolved theory of the Court distinguishing between a state and its government, and holding that Texas had always maintained its position as a state in the Union, however its usurping government may have purported to act on a contrary assumption; but he looked at the plain facts of the case, and the facts told him that the Reconstruction Acts had wiped out the state of Texas as such, and had placed its territory together with that of another seceding state under the dictation of a military governor, and Miller accordingly dissented and said that Texas was not a state. When the question was, in *In re Neagle*,<sup>45</sup> whether the Federal Government could supervise the protection of its judges from personal assault, and in such manner that its agents would not be amenable to the state courts for their conduct in the performance of such duty, Miller palpably wrenched and distorted the plain meaning of

<sup>44</sup> 7 Wallace's Reports, 700 (1868).

<sup>45</sup> 135 United States Reports, 1 (1889).

terms used in the *habeas corpus* act of Congress in order to arrive at the desired conclusion that Neagle could be freed from the ordeal of a trial in a state court on *habeas corpus* proceedings to the federal courts. When the question was, in *United States vs. Kagama*,<sup>46</sup> whether Congress could vest the federal courts with direct jurisdiction over crimes committed by Indians, Miller evaded the purport of all the previous decisions, which had given to the Indians a status of semi-independence, to be dealt with by treaties entered into with them, and held that they could be governed directly by Congressional legislation. because that was the position which practical considerations made it expedient for the judiciary to adopt.

After all, constitutional law is statesmanship rather than jurisprudence, and Miller was a statesman rather than a lawyer. He determined what was the best policy to pursue rather than what the courts had previously decided. His shrewd wisdom and foreseeing judgment molded the politics of our government along the most advantageous lines, and he acted on the assumption that it was better to adopt a desirable policy than that the Supreme Court should be theoretically consistent. It has been sometimes said of him, as it has been said of so many judges, that he swept aside the law in order that justice might prevail. It would be more accurate to say that law to Miller meant justice, and where the

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<sup>46</sup> 118 United States Reports, 375 (1885).

historical development of the science of law had separated it from justice Miller reinstated justice in the law so as to make the latter conform to existing conditions.

Of the more personal phase of Miller's nature there are many interesting illustrative anecdotes. The country rather enjoyed his brusque, rugged manner; it liked to think of him as of a crude western giant, and delighted in the stories that gathered around his name. Like most men of vigorous intellectual powers, he became irritable beyond measure at any exhibition of stupidity or prosiness on the part of the attorneys who appeared before him. Once he was holding circuit court in St. Louis on an extremely warm day, and listening to a dry argument in an equity suit. The court room was deserted save for the judge, the lawyers and the court attendants, the latter of whom were dozing in their chairs. Miller's cravat and collar were loosened and he was vigorously fanning himself, shifting uneasily in his seat, and glaring impatiently at the lawyer who had been talking on and on unceasingly. Finally he could no longer restrain himself; he started up, leaned over his desk, and fairly shouted at the lawyer the remark: "Damn it, Brown, come to the point." The lawyer, startled into confusion by this judicial interruption, said: "What point, your Honor?" "I don't know," yelled Miller, "*any* point, *some* point!" Poor Brown quit ignominiously, and with little hope of his having made a very strong

impression. So terrible was the withering manner of Miller at times that even experienced attorneys dreaded the task of arguing a case before him which they thought not likely to meet with his approval. And yet they appreciated his innate kindliness and sincerity, and when he suddenly died, October 13th, 1890, the members of the bar of the Supreme Court all felt that they had lost a friend.

"It is safe to say that, with the exception of Chief-Justice Marshall, no American judge has made a deeper impression upon the jurisprudence of this country than he has," said Mr. Justice Harlan in referring to Miller,<sup>47</sup> and from this remark has arisen the general estimate of Miller's ability that awards him the rank of the greatest constitutional lawyer since Marshall. Without seeking thus to compare his talents with those of other great American jurists, this at least may be said,—that the years during which Miller sat on the Supreme Court bench were the most important, in the domain of constitutional law, next to the period of the constructive work of Marshall, that during those years Miller was the dominant personality on the bench, and that the work then done by the Supreme Court was of the highest excellence, determining, as it did, the method of reconstruction of the nation, preserving unimpaired the federal nature of the Government in spite of the centralizing purpose of the fourteenth amendment, and successfully solving the most complex and

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<sup>47</sup> Central Law Journal, vol. XXXI, 333.

fundamental industrial problems which had ever confronted the American people. The secret of Miller's greatness in thus dealing with these manifold problems was, far above even his recognized intellectual powers, his devoted love for the Constitution. He said that it was his profound belief that the wisdom of man, unaided by inspiration, had produced no other writing so valuable to humanity.<sup>48</sup> He loved his country with all his heart, its people, its government, its institutions. He looked broadly out into the future; he saw there with clear vision the destined greatness of America, and his labor was to place the constitutional construction of the government upon such a broad foundation that no legal limitations might check its glorious possibilities. Thus, more than a learned lawyer, and more than a wise judge, he was above all things a great American.

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<sup>48</sup> Oration delivered at the hundredth anniversary of the framing of the Constitution, in Independence Square, Philadelphia, September 17th, 1887.















